

Supreme Court, U. S.

FILED

JUN 23 1976

MICHAEL NODAK, JR., CLERK

APPENDIX.

IN THE
Supreme Court of the United States

October Term, 1975
No. 75-1053

JOSEPH W. JONES, as Director of the County of
Riverside, California, Department of Weights and
Measures,

Petitioner,

vs.

THE RATH PACKING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

PETITION FOR CERTIORARI FILED JANUARY 26, 1976.
CERTIORARI GRANTED APRIL 19, 1976.

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vs.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

APPENDIX.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

73 715 R

Jury demand date:

U. S. D. C. No. 475 Rec.

TITLE OF CASE	ATTORNEYS
GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,	For plaintiff: Gibson, Dunn & Grutcher 620-9300 515 So. Flower St., L.A. Ca 90071
Plaintiffs	
VS	
JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures,	
Defendant and counterclaimant,	
VS.	
GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,	For defendant:
counterdefendants,	
COMPLT AGAINST "OFF SALE" ORDERS F.O.R.	

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk	4/2/73	24116	15	4/2/73
		7/11/73	5-1152	3	7/11/73
J.S. 6 mailed	Marshal	10-23-73	24186	5	10/24/73
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

BEST COPY AVAILABLE

Page 2

DATE	PROCEEDINGS	Date Filed or Judgment No.
4/2/73	Fld Complt against "Off Sale" Orders. Issd sumas, Md JS-5.	
4/18/73	Fld retn of sumas.	rs
4/20/73	Fld deft's ANSWER and counterclaim for inj, by Joseph W. Jones. Fld sd defts note of mtn retablr 5/7/73, 9:30am and mtn for pre-lim inj; and supports resp. Fld sd defts affid of John LaRose. Fld sd defts affid of Sanford Blake Ottermess. Fld sd defts affid of V. Miller. Fld defts affid of Ernest J. Carbono.	kh
5/2/73	Fld Ex Parte Application for Cont of Hrg on Mtn for Prelim Injunction & Ord (R) thereon cont to 5/21/73 at 10am.	an
5/10/73	Fld Plt's & Counterdeft's Reply to Counterclaim.	an
5/13/73	Fld note of P/T conf set for 7/16/73, 10AM.	an
5/16/73	Fld Plt's & Counterdeft's Stmt of reasons & memo of pts & auths in opposition to mtn for preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Henry Sumpter, Jr. in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Roger C. Miller in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Charles E. Joyce in opposition to preliminary injunction; Fld Plt's & Counterdeft's Affidavit of Donald B. Colpitts in opposition to preliminary injunction.	an
5/18/73	Fld Jones's reply to Plt's Memo.	an
5/22/73	LODGED Plt's & Counterdeft's Ord re: Mtn of deft J.W. Jones for preliminary injunction - denied.	an
5/24/73	Fld Deft Jones's Objection to proposed ord.	an
5/24/73	Ord re: prelim injunction denied. Plt to prep order.	McB
6/29/73	Fld deft & counterclaimant Joseph W. Jones' objections to fdgs of fact & conclusions of law proposed by plts. Fld plts' not of mtn retablr 7/16/73, 10am, & mot for summary judgment. Fld plts' statement of reasons & memo of pts & auths in support of not for summary judgment.	cam rjf
	LODGED plts' findings of fact & conclus of law.	rjf
	LODGED proposed plts' summary judgment.	rjf
7-5-73	Fld findings of fact & conclusions of law (R) Mot for a preliminary injunction denied.	mc
7/10/73	Fld Ord (R) that the mot of deft Joseph W. Jones for prelim inj is Denied.	rjf
7/11/73	Fld stip & Ord (R) confd P/T conf retablr at the time of hrg of plts' not for summary judgment.	rjf
	Fld ex parte applc for contd of hrg on mot for summary judgment & Ord (R) retablr 8/13/73, 10am.	rjf
	(SEE PAGE 3)	

PAGE 3

DATE	PROCEEDINGS	Date Filed or Judgment No.
7/27/73	Fld plts' not of mtn retablr 8/13/73, 10am, & mot for hrg & determination by a District Court of Three Judges.	rjf
8-7-73	Fld mot for ORDER (R) shortening time to 8-13-73, 10am, for hearing on mot for S/J.	mr
	Fld deft & counterclaimant Joseph W. Jones not of mot for S/J, retablr 8-13-73.	mr
	Fld mot for S/J by deft & Counter claimant Joseph W. Jones & supporting memo.	mr
	Fld deft & counter-claimant Joseph W. Jones affid of John La Rose	mr
	Fld deft & counter-claimant Joseph W. Jones affid of Sanford Blake Ottermess.	mr
	Fld deft & counter-claimant Joseph W. Jones affid of James W. Robey.	mr
	Fld deft & counter-claimant Joseph W. Jones affid of Joseph W. Jones	mr
	LODGED PROPOSED findings of fact & conclus law.	mr
	LODGED PROPOSED S/J.	mr
8/9/73	Fld defts & counterclaimant's "Jones" response memo to mot for S/J & to mot for hrg by a Dist Crt of 3 judges.	
8-10-73	Fld Plt's Affid. of Dean C. Dunlavey in Oppos. to Order	an
8-10-73	Shortening time re Jones' Mot. for S/J.	an
8-10-73	Fld Statmt of genuine issues in Oppos. to Jones' Mot. for S/J	an
8/13/73	Ord the plts' not for S/J; the deft's not for S/J; amtn not for 3-Judge Crt submitted.	McB
8-7-73	LODGED proposed Findings of fact & conclusions of law. (not used, placed in file unsigned.).	mn
9/12/73	Fld memo opin & ord thereon enjoining deft frm applying the provisions of Calif. Business & Professions Code, etc. to the products of plts., etc. The crt retains jurisdiction & the mot of deft for summary judgment is denied; the mot for a 3-judge crt is denied. Except as herein expressly provided, the mot for summary judgment of plts is denied. (Ent 9/24/73) JS-6 old cpy & nfd prty	
10/17/73	Fld defts NOTICE OF APPEAL, (w/service thereon) cpy to R, and designation of record on appeal.	kh
10/20/73	Fld plts NOTICE OF APPEAL, (w/service thereon) cpy to (R). Fld plts bond for costs on appeal in the sum of 250.00, Fidelity and Deposit Company of Maryland No. 8731694. Placed in file.	
10/23/73	Fld plts cost bond on appeal in the sum, of 250.00 St. Paul Fire and Marine Insurance Co. Placed in file.	kh

I hereby affirm and certify on 11/12/73
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my
legal custody.

FILED IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
CLERK OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
11/12/73

U.S. District Court
 Filed in D.C. 4/27/73
 Notice of Appeal
 Filed: 10/17/73

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

73- 3583

73- 3583

CIVIL CENTRAL DISTRICT OF CALIFORNIA	CROSS APPEAL TO: 74-1051
<p>GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,</p> <p style="text-align: center;">Plaintiffs - Appellees</p> <p style="text-align: center;">vs.</p> <p>JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures,</p> <p style="text-align: center;">Defendant - Appellant</p>	<p>For Appellant: Dean C. Dunlavey, Esq. Gibson, Dunn & Crutcher</p> <p>For Appellee: Ray T. Sullivan, Jr., County Counsel Loyal E. Keir, Deputy County Counsel</p>

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
DEC 28 1973	Deposit, R. [Signature]	-	-	-
JAN 28	Treasurer U.S.	-	-	-
JAN 18	Deposit, R. [Signature] (\$12,351)	-	-	-
JAN 18	Treasurer U.S.	-	-	-

A TRUE COPY
 ATTEST APR 27 1978
 EMIL E. MEEFI, JR.
 Clerk of Court
[Signature]
 Winifred D. Taylor
 Chief Deputy Clerk

To Repro. _____ from Repro. JAN 31 1974

SAME RECORD FOR 74-1051		CLERK'S FEES	
DATE	FILINGS PROCEEDINGS	APPELLANT	APPEL
	Filed on December 12, 1973, Motion and ORDER (C) extending time to transmit the record on appeal to January 15, 1974	\$50.	
Dec 21	DOCKET FEE PAID, DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL		
	-ra-		
Dec 28	FILED CERT TRANS OF RECORD ON APPEAL IN THREE VOLUMES: VOL I & II PLEADINGS. ORIG ONLY: VOL III REPORTER'S TRANSC, ORIG & 1 COPY		
1974			
Jan 14	Appellant's Brief Due February 23, 1974		
	PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF BELOW WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. -ra-		
	Clerk's		
Jan. 22	FILED TWO ADDITIONAL COPIES OF VOLUME ONE AND TWO. gb Fee	\$15.	
Feb 15	Filed orig & 3 cross-aplts' (General Mills) motion for ext of time to file briefs; to "C" cs		
FEB 23 1974	FILED ORDER (C) EXTENDING TIME TO FILE cross aplts' (GENERAL MILLS) Brief to MARCH 25, 1974. (rg)		
MAR 4	RECEIVED 25 AMICUS BRIEFS (U.S.A.) cr		
MAR 4 1974	Filed in 74-1051 (USA) as amicus curiae motion for leave to file late brief, with copy of brief attached to C. (rg)		
MAR 7 1974	FILED ORDER (M) in 74-1051 granting (USA) leave to file amicus curiae brief out of time. (rg)		
MAR 7 1974	FILED (25) BRIEF OF AMICUS (FILED IN 74-1051. for USA) gb		
MAR 12 1974	Filed orig. & 3 appellee's/cross applt's (GENERAL MILLS) motion for further ext of time to file brief to C. (rg)		
Mar 18	Filed Order (M) granting aples/cross-aplts (General Mills) an ext of time to April 24, 1974 for filing briefs. cs		
Apr 15	Filed motion for ext of time to file cross applt's brief (C) (General Mills) cl		
Apr 18	Filed Order (C) granting cross-aplts (General Mills) an ext of time to May 1, 1974 for filing brief. cs		
MAY 1 1974	FILED 25 APPELLANTS BRIEFS (4/2/74) (for General Mills)		
May 10	Filed applt's motion for ext of time to file brief (C) cl		

CROSS APPEAL TO: 73-3583

For Appellant:
Dean C. Dunlavey, Esq.
Gibson, Dunn & Crutcher

Plaintiffs - Appellants

vs.

JOSEPH W. JONES, as Director of the
County of Riverside Department of
Weights and Measures,

For Appellee:
Ray T. Sullivan, Jr., County
Counsel
Loyal E. Keir, Deputy County
Counsel

Defendant - Appellee

[illegible]

SAME RECORD FOR 73-3583		CLERK'S FEES	
DATE	FILINGS PROCEEDINGS	APPELLANT	APPEE
Dec 28	Filed on December 12, 1973 In 73-3583, Motion and Order (C) extending time to transmit the record on appeal to Jan 15, 1974 FILED CERT TRANSC OF RECORD ON APPEAL (Filed In 73-3583) IN THREE VOLUMES: VOL I & II, PLEADINGS, ORIG ONLY; VOL III REPORTER'S TRANSC, ORIG & 1 COPY		
Jan 11	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL		
Jan 14	Appellant's Brief Due February 23, 1974 PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF BELOW WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED -ra-		
Jan. 22	FILED IN 73-3583 TWO ADDITIONAL COPIES OF VOLUME I & II. Clerk's Fee \$15. qb		
Feb 15	Filed, in 73-3583, orig & 3 cross-aplts' (General Mills) motion for ext of time to file briefs; to "C" cs		
FEB 24 1974	FILED ORDER (C) in 73-3583 extending time to file cross applt's' (GENERAL MILLS) brief to MARCH 25, 1974. (rg)		
MAR 4	REC'D IN 73-3583, 25 AMICUS BRIEFS (U.S.A.) cr		
MAR 4 1974	Filed orig. & 3 (USA) as amicus curiae motion for leave to file late brief with copy of brief attached to C. (rg)		
MAR 7 1974	FILED ORDER (M) GRANTING (USA) leave to file amicus curiae brief out of time. (rg)		
MAR 7 1974	FILED (25) BRIEF OF AMICUS (FOR USA) qb		
MAR 12 1974	Filed in 73-3583 appellee's/cross applt's (GENERAL MILLS) motion for further ext of time to file brief to C. (rg)		
Mar 18	Filed, in 73-3583, Order (M) granting aples/cross-aplts (General Mills) an ext of time to April 24, 1974 for filing briefs. cs		
Apr 15	Filed in 73-3583 motion for extension of time to file cross applt's brief (General Mills) (C) cl		
Apr 18	Filed, in 73-3583, Order (C) granting cross-aplts (General Mills) an ext of time to May 1, 1974 for filing brief. cs		
May 1	Filed, in 73-3583, 25 appellants briefs (for General Mills) qb		
May 10	Filed in 73-3583 applt's motion for ext of time to file brief (C) cl		
May 20	Filed order in 73-3583 (M) extending time to June 24 to file applt's brief. ty		

SEE SECOND SHEET

SECOND SHEET - #74-1051

DATE	FILINGS PROCEEDINGS	CLERK	
		APPELLANT	APPELL
1974			
June 14	Filed, in 73-3583, aplt's (Joseph W. Jones) motion for an ext of time to file brief to (C). jr		
June 18	Filed order (C), in 73-3583, granting aplt an ext of time to July 24, 1974 to file brief. Subject to reconsideration if any objection filed within 7 days. jr		
July 22	Filed 25 Aples briefs (Jones), cross Appls brief in 73-3583. (July 19, 1974) tj		
July 22	Filed, in 73-3583, as of July 19, 25 briefs of amicus, (State of Hawaii) (July 17, 1974). tj		
July 23	Filed, in 73-3583, 25 briefs of amicus, (State of Calif). (July 19, 1974)		
July 26	Filed, in 73-2481, aple/cross aplt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
July 29	Filed, in 73-2496, aplt's (J. Jones) motion for consolidation of #73-3583 & #73-1051 for oral argument on appeal and to expedite oral argument to (C). jr		
July 31	Filed, in 73-2481, order (C) granting aplt (J. Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr		
August 2	Rec'd, in 73-2481, Atty General's letter joining in motion for priority hearing. cs		
Aug 5	Filed, in 73-2481, aple & aplt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr		
Aug 13	Filed, in 73-2481, aplt's (Jones) response to Rath's opposition to motion for consolidate appeals. cs		
Aug 13	Rec'd, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr		
Sept 11	Filed, in 73-3583, aplt/cross aple (General Mills, etc) motion for an ext of time to file brief to (C). jr		
Sept 13	Filed, in 73-3583, order (C) granting aplt/cross aples an ext of time to October 18, 1974 to file reply brief. Subject to reconsideration if any objection filed within 7 days. jr		

74-1051

DATE	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELL
Oct 15	Filed, in 73-3583, 25 briefs of Aplt/cross Aple (General Mills) (Oct 14, 1974) tj	CALENDARED	
Nov 12	REC'D ORIG. + 24 REPLY BRIEF OF APLT JONES - LATE (11/11/74) fm		
DEC 5 1974	Cause argued & submitted to Br. T, CJJ, Rich.		
1975	(Deputy County Counsel)		
March 12	Rec'd Aplt/Cross-Aple/letter re: Additional citations. (to panel)		
Mar 19	Rec'd Defendant's County Counsel letter March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974. (passed to panel) sj		
Mar 20	Rec'd, in 73-3583, aple counsel's letter of add'l citations to (panel). jr		
Oct. 29	ORDERED OPINION (RICH) FILED & JUDG TO BE FILED & ENTD		
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct. 29	Filed & Entered Judgment. + 15-34		
Nov 7	Filed Bill of Costs (Gen. Mills, Pillsbury & Seaboard). ec		
JAN 14 1976	ISSUED JUDGMENT		
Mar 2	Filed in 73-3583, emergency motion (Jones) for recall of mandate, etc. (pa)		
Mar 12	Filed order (Br. T & Rich) the motion to recall of mandate is denied. jr		
Feb. 9	Received notice from Supreme Court that petition for certiorari has been filed. Assigned No. 75-1052. wdt		
Apr. 26	Filed certified copy of Supreme Court order granting certiorari on April 19, 1976. To panel. wdt		

The Opinion of the United States Court of Appeals for the Ninth Circuit in the Case of *The Rath Packing Company v. M. H. Becker, et al.*, docket numbers 73-2481, 73-2482, 73-3092, 73-2496 and 73-3180, is in the Appendix to the Petition, pages 1-34.

The Opinion of the United States Court of Appeals for the Ninth Circuit in the case of *General Mills, Inc., et al. v. Joseph W. Jones*, docket numbers 74-1051 and 73-3583, is in the Appendix to the Petition, pages 35-52.

**Complaint for Declaratory Relief and Injunction Against
"Off Sale" Orders.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant. Civil Action No. 73-715-R.

As and for their complaint herein, plaintiffs allege as follows:

1. Plaintiff General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

2. Defendant Joseph W. Jones ("Jones") is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action is instituted and arises under the Constitution of the United States, under 15 U.S.C. §§ 1451-1461 (the Fair Packaging and Labeling Act), and under 21 U.S.C. §§ 301-392 (the Federal Food, Drug, and Cosmetic Act). Furthermore, this action is between citizens of different states. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. Jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a); venue is based on 28 U.S.C. § 1391. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court.

4. Each plaintiff joins in this one action in that each plaintiff asserts a right to relief in respect of and arising out of the same series of transactions and occurrences, and questions of law and fact common to all of them will arise in the action.

5. Each plaintiff manufactures, packages and sells wheat flours conforming to definitions and standards of identity set forth in 21 C.F.R. Part 15, Subpart A promulgated by the Secretary of Health, Education and Welfare pursuant to 21 U.S.C. §§ 341, 371; each plaintiff is engaged in interstate commerce in so doing. Wheat flours are "foods" under the Federal Food, Drug, and Cosmetic Act and those sold through retail stores are "consumer commodities" under the Fair Packaging and Labeling Act.

6. The labeling of all wheat flours manufactured, packaged and sold by each plaintiff is performed in

accordance with the applicable requirements of the Federal Food, Drug, and Cosmetic Act and of the Fair Packaging and Labeling Act and of regulations promulgated thereunder by the Secretary of Health, Education and Welfare. Said statutes require on the label of each wheat flour package an accurate statement of the quantity of contents of such package in terms of weight, exclusive of wrappers and other material packed therewith, at the time such wheat flour package is introduced or delivered for introduction by each plaintiff into interstate commerce or distributed or caused to be distributed by plaintiff in interstate commerce (15 U.S.C. §§ 1452-1453; 21 U.S.C. §§ 331(a), 343(e)). Said regulations provide, pursuant to 15 U.S.C. § 1454(b) and 21 U.S.C. § 343(e), that reasonable variations from the stated quantity of contents caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized (Title 21, Code of Federal Regulations § 1.8b(q)).

7. Because of the nature of wheat flours and their manufacture, reasonable variations from the stated quantity of contents are caused by unavoidable deviations in good manufacturing practice and by loss or gain of moisture during the course of good distribution practice.

8. Defendant Jones now contends to have the right to impose, and has imposed and is imposing, on said wheat flour packages requirements as to labeling of the net quantity of contents which are in addition to and different from, and which conflict with, the requirements of said federal statutes and regulations and which are less stringent than and/or require information different from the requirements of said federal statutes and regulations. In particular, defendant Jones

now contends to have the right to impose, and has imposed and is imposing, a labeling requirement that the statement on each such package of wheat flour of the quantity of contents of such package in terms of weight be accurate at a time after such package is introduced or delivered for introduction by each plaintiff into interstate commerce, or after such package is distributed or caused to be distributed by each plaintiff in interstate commerce; namely, at the time of sale or offer for sale at the retail or consumer level.

9. Defendant Jones contends that said labeling requirement is imposed by him lawfully pursuant to the authority of California Business and Professions Code §§ 12211 and 12607 and Title 4, California Administrative Code, Chapter 8, sub-chapter 2 (said statutes and regulations sometimes referred to hereinafter collectively as the "state weight law").

10. Pursuant to defendant Jones' aforesaid contentions and requirements, and by acting through his deputies and inspectors, defendant Jones has ordered and is ordering "off sale" packages of wheat flour manufactured, packaged, labeled, and sold by each plaintiff in full compliance with the applicable requirements of the aforesaid federal statutes and regulations, and otherwise has prevented and is preventing the sale by each plaintiff and by retailers of such packages of wheat flour.

11. In doing the foregoing, each plaintiff contends that defendant Jones is acting unlawfully and beyond the scope of his authority, in that:

(a) said state weight law as applied by defendant Jones to plaintiffs' wheat flours constitutes a deprivation of property without due process of law and is violative of the 14th Amendment to the Constitution of the United States;

(b) said state weight law as applied by defendant Jones to plaintiffs' wheat flours is an unlawful and unreasonable burden on interstate commerce;

(c) said state weight law as applied to plaintiffs' wheat flours is necessarily and expressly preempted by, and is in addition to and different from and in conflict with, laws of the United States which are the supreme law of the land;

(d) plaintiffs' wheat flours are exempted by California law from said state weight law;

(e) defendant Jones is not applying the state weight law to plaintiffs' wheat flours in accordance with California law;

(f) Title 4, California Administrative Code, Chapter 8, sub-chapter 2 is invalid for failure to comply with California Business and Professions Code § 12211 and/or § 12607.

12. By his said unlawful acts, defendant Jones has caused each plaintiff monetary damages in excess of \$10,000, as well as irreparable injury to its reputation among dealers and the consuming public. Defendant Jones is continuing and threatening to continue his said acts, and will cause each plaintiff further monetary damages and further immediate and irreparable injury, unless and until restrained by this Court. Pecuniary compensation to any plaintiff will not afford adequate relief for such acts.

13. An actual controversy now exists between each plaintiff and defendant Jones with respect to the legal relations of the parties and the rights of each plaintiff under the Constitution of the United States, under the aforesaid federal statutes and regulations, and under California law. The value to each plaintiff of its right to be free of the aforesaid requirements imposed by

defendant Jones exceeds the sum of \$10,000, exclusive of interest and costs.

WHEREFORE, each plaintiff prays judgment as hereinafter set forth:

1. Declaring that the imposition of the state weight law (sections 12211 and 12607 of the Business and Professions Code and Title 4, California Administrative Code, Chapter 8, sub-chapter 2, individually and collectively) on each plaintiff's wheat flours is unlawful and beyond Jones' authority for each and every ground alleged in paragraph 11 of this Complaint; and

2. Permanently restraining and enjoining defendant Jones, and his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him:

(a) from imposing the said state weight law (sections 12211 and 12607 and sub-chapter 2, individually and collectively) on each plaintiff's wheat flours; and

(b) from imposing on each plaintiff's wheat flours any labeling requirement which is unconstitutional, or which is in addition to or different than or in conflict with requirements made under the Federal Food, Drug, and Cosmetic Act and/or under the Fair Packaging and Labeling Act, and/or which is not in accordance with California law; and

3. For costs of suit incurred by each plaintiff; and

4. For such other and further relief which the Court may deem just and proper.

GIBSON, DUNN & CRUTCHER

/s/ By Dean C. Dunlavey

Dean C. Dunlavey

Attorneys for Plaintiffs

Answer and Counterclaim for Injunction.

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counter-defendants. Civil Action No. 73-715-R.

Defendant, JOSEPH W. JONES, hereinafter Jones, for his answer and counterclaim herein, alleges as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Denies that this action arises under the Constitution of the United States or under the Federal Fair Packaging and Labeling Act, 15 U.S.C. Sections 1451-1461, but otherwise admits the allegations of Paragraph 3.
4. Denies upon information and belief the allegations set forth in Paragraph 4.
5. Admits that each Plaintiff manufactures, packages, and sells wheat flours, that each Plaintiff is engaged in interstate commerce, that wheat flours are "foods" and that foods sold through retail stores are "consumer commodities", but otherwise denies the allegations in Paragraph 5.
6. Admits that the Federal Food, Drug and Cosmetics Act, i.e. 21 U.S.C. Section 343(a) and (e),

requires an accurate statement of the quantity of the contents on each package of food products in terms of weight, measure, and numerical count, and further admits that certain regulations promulgated by the Secretary of the Department of Health, Education and Welfare provide that reasonable variations from the stated quantity of contents caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviation in good manufacturing practice will be recognized, but otherwise denies the allegations of Paragraph 6.

7. Denies upon information and belief the allegations of Paragraph 7.

8. Admits that defendant has imposed requirements that the packaged food products manufactured or prepared by plaintiffs should conform accurately to the label weight of the packages at retail, but otherwise denies the allegations of Paragraph 8.

9. Admits that defendant ordered off-sale packages of food products manufactured or prepared by plaintiffs, pursuant to the authorization of California Business and Professions Code, Section 12211 and 4 California Administrative Code, Chapter 8, Subchapter 2, but denies that he imposed any labeling requirements.

10. Admits that Jones has ordered off-sale packages of wheat flour manufactured, packaged, labeled and sold by each plaintiff, but denies the remaining allegations in Paragraph 10.

11. Denies the allegations set forth in Paragraphs a through f.

12. Denies the allegations of Paragraph 12.

13. Denies the allegations of Paragraph 13.

First Affirmative Defense

14. The complaint fails to state a claim against Jones upon which relief cannot be granted.

Second Affirmative Defense

15. In making the off-sale orders described in the complaint Jones acted in accordance with the statutory authority contained in the California Business and Professions Code Section 12211 and the regulatory authority set forth in 21 C.F.R. Section 1.8(b)(q).

Third Affirmative Defense

16. Counterdefendants' unclean hands constitute a bar to equitable relief. They have violated not only state, but also *federal*, law. The distribution by them of packages of wheat flour misbranded as to weight is proscribed by the Federal Food, Drug and Cosmetics Act, as amended December 30, 1970, Pub. L. 91-601, Section 7(c), 84 STAT. 1673, 21 U.S.C. Section 343(a) and (e). Such federal law is even more strict than the California law. Under the California law, reasonable plus or minus variations are permitted within a range of tolerances prescribed by the California Administrative Code. However the federal law requires an exact standard of accuracy. Although the regulation promulgated by the Secretary of Health, Education and Welfare, *i.e.*, 21 C.F.R. Section 1.8(b)(q), provides for "reasonable variations", such regulation is vague and indefinite in defining reasonableness, and is therefore void, thereby leaving the federal statute as an exact and precise statute which permits no variations whatever from the weight stated on the package labels.

Counterclaim

17. Jones is Director of the Department of Weights and Measures of the County of Riverside and is a citizen of the State of California.

18. Counterdefendant General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Counterdefendant The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Counterdefendant Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

Each counterdefendant has qualified to do business in the State of California and does business within the County of Riverside, State of California, and elsewhere within the State of California.

19. Each counterdefendant manufactures, packages, and sells wheat flours, and is engaged in interstate commerce. Wheat flours constitute foods under the Federal Food, Drug and Cosmetics Act, and the flours sold through retail stores are consumer commodities.

20. For purposes of this counterclaim Jones relies upon, and accordingly incorporates by reference, the allegations of jurisdiction set forth in Paragraph 3 of the complaint and admitted in Paragraph 3 herein. Although no independent grounds of jurisdiction are required, Jones also relies upon 21 U.S.C. §332, and upon the judicial doctrine of pendent or ancillary jurisdiction, and accordingly alleges that this Court has

pendent or ancillary jurisdiction for purposes of this counterclaim.

21. At all times herein mentioned, counterdefendants, and each of them, were engaged in the business of processing, packaging, selling, distributing and otherwise disposing of packages of wheat flour to the general public and to others for resale to the general public within the County of Riverside, State of California.

22. Beginning at an exact date unknown to counterclaimant, but beginning at least six (6) months prior to the filing of this counterclaim and continuing to the date of this counterclaim, counterdefendants, and each of them, have engaged in and are still engaging in a pattern of conduct constituting actions of unfair competition as made unlawful and prohibited by Civil Code Section 3369, by making the representations as hereinafter set forth, each of which constitutes an unlawful, unfair and fraudulent business practice.

23. The representations referred to in Paragraph 22, *supra*, have been made by counterdefendants and each of them by causing packages of wheat flour, packaged by counterdefendants, and each of them, to be labeled certain net weights, such as, 5 pounds, 10 pounds and 50 pounds, and by distributing the same for sale to various food distributors in Riverside County, California, including, but not limited to, the distributors named herein. The schedule set forth below contains the names of the distributors, the dates of inspection by Jones' inspectors, and the numbers of packages marked off-sale classified according to size of packages.

<u>Dates of Inspection</u>	<u>No. of Pkgs. Marked Off Sale</u>	<u>Miller</u>	<u>Distributor</u>
2 lb. pkgs.			
10-16-72	3,288	Seaboard	Certified Grocers
5 lb. pkgs.			
10-16-72	325	Pillsbury	A. M. Lewis
10-17-72	10,830	Seaboard	Certified Grocers
12-1-72	7,200	Pillsbury	Certified Grocers
10-17-72	800	Pillsbury	A. M. Lewis
11-28-72	800	Pillsbury	A. M. Lewis
10 lb. pkgs.			
10-16-72	2,660	Seaboard	Certified Grocers
10-16-72	35	Pillsbury	A. M. Lewis
10-17-72	2,865	Gen'l Mills	A. M. Lewis
11-28-72	1,100	Gen'l Mills	A. M. Lewis
25 lb. pkgs.			
11-29-72	678	Gen'l Mills	Certified Grocers
50 lb. pkgs.			
11-28-72	37	Gen'l Mills	A. M. Lewis

24. On each date set forth in Paragraph 23, *supra*, an inspector employed by Jones in his capacity of Director of the Department of Weights and Measures of the County of Riverside, inspected sample packages of wheat flour, determined the net weight of the contents of the packages inspected, and found that said packages contained less than the label weight stated on the package.

25. Since the direct and proximate result of the actions of counterdefendants and each of them constitutes unfair competition as hereinabove set forth, consumers have been deceived and thereby injured,

and competitors of counterdefendants have been injured inasmuch as they must either adopt counterdefendants' unlawful practices to successfully compete at the consumer trade level or lose substantial business to counterdefendants.

26. Unless restrained by this Court counterdefendants and each of them will perform the acts referred to, and such acts will result in irreparable injury, loss, and damage to the general public.

27. The issuance of a preliminary injunction herein pending the final hearing and determination by this Court will not create any burden on the counterdefendants that they would not otherwise sustain if they complied with the law.

WHEREFORE, counterclaimant prays for judgment in his favor:

(1) Declaring that the enforcement of the California law and regulations in ordering off-sale packaged wheat flour when such packages are misbranded as to weight at the consumer trade level, (a) is not preempted by federal law, (b) does not constitute a deprivation of property within due process of law and is not violative of the Fourteenth Amendment to the Constitution of the United States and (c) does not constitute a burden on interstate commerce.

(2) Ordering that the complaint against Jones to enjoin him from ordering off-sale packaged wheat flour when such packages are misbranded as to weight at the consumer trade level, be denied.

(3) Dismissing the action on the grounds that (a) there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law, (b) in making the off-sale orders Jones acted

in accordance with California statutory and regulatory authority, and (c) counterdefendants' unclean hands constitute a bar to equitable relief.

(4) Restraining and enjoining the counterdefendants from engaging in, committing or performing, directly or indirectly, or by any means whatsoever, any of the following acts:

(a) Carrying on any unlawful, unfair or fraudulent business practices in connection with the sale of wheat flour processed, packaged and distributed by the counterdefendants and each of them, and

(b) Distributing, offering for distribution or sale packages of wheat flour to the general public, or to any other person, corporation or other entity, for sale or distribution to the general public, unless the net weight of the contents of the said packages is equal to the net weight marked on the package labels.

(5) Granting such other and further relief which the Court may deem just and proper.

Dated: April 19, 1973.

RAY T. SULLIVAN, JR.,
County Counsel

LOYAL E. KEIR,
Deputy County Counsel

/s/ By Loyal E. Keir

Loyal E. Keir, Deputy County Counsel
Attorneys for Defendant and Counter-
complainant, Joseph W. Jones

VERIFICATION

State of California, County of Riverside—ss.

JOSEPH W. JONES, being duly sworn, deposes and states that he resides in the City of Riverside, State of California; that he is the defendant and counterclaimant herein; that he has read the foregoing Answer and Counterclaim and knows the contents thereof, and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Executed on April 19, 1973 at Riverside, California.

/s/ Joseph W. Jones

JOSEPH W. JONES, Defendant
and Counterclaimant

Subscribed and Sworn to before me this 19th day of April, 1973.

/s/ Anita L. Fullinwider
ANITA L. FULLINWIDER
Notary Public in and for
Said County and State*

[Seal]

*Affidavit of Service by mail is omitted.

Reply to Counterclaim.*

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones, as Director of the County of Riverside, Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

Each of General Mills, Inc., The Pillsbury Company and Seaboard Allied Milling Corporation, as and for its reply to the counterclaim herein, admits, denies alleges as follows:

1. Answering Paragraph 19, admits the averments thereof and alleges that flours sold through retail stores are "consumer commodities" under the federal Fair Packaging and Labeling Act.

2. Answering Paragraph 20, admits the averments set forth in Paragraph 3 of the complaint which are admitted in Paragraph 3 of the answer. Except as hereinabove specifically admitted, denies the averments thereof.

3. Answering Paragraph 21, admits that each counterdefendant was and is engaged in the business of processing, packaging, selling and distributing packages of wheat flour intended for ultimate re-sale to the general public within the County of Riverside, State of California. Except as hereinabove specifically admitted, denies the averments thereof.

4. Answering Paragraph 22, denies the averments thereof.

*Certificate of Service by mail is omitted.

5. Answering Paragraph 23, admits that it has packaged wheat flour, has caused such packages to be accurately labeled as to net weight, and has distributed the same to food distributors in Riverside County, California; admits that some such packages have been ordered off-sale by defendant Jones' inspectors. Except as hereinabove specifically admitted, denies the averments thereof.

6. Answering Paragraph 24, is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

7. Answering Paragraph 25, denies the averments thereof.

8. Answering Paragraph 26, denies the averments thereof.

9. Answering Paragraph 27, denies the averments thereof.

FIRST AFFIRMATIVE DEFENSE

10. The counterclaim fails to state a claim upon which relief can be granted.

WHEREFORE, each counterdefendant prays judgment as hereinafter set forth:

1. As prayed in the complaint; and
2. That counterclaimant take nothing under the counterclaim and that it be dismissed.

GIBSON, DUNN & CRUTCHER

/s/ By Dean C. Dunlavy

Dean C. Dunlavy

Attorneys for Plaintiffs and
Counterdefendants

Affidavit of Erwin V. Miller.

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counterdefendants. Civil Action No. 73-715-R.

State of California, County of Riverside—ss:

Erwin V. Miller, being first duly sworn, states as follows:

1. He is now and at all times herein mentioned was a duly appointed, qualified and acting Inspector for the Department of Weights and Measures for the County of Riverside, State of California.

2. He has been employed as an Inspector for the said Department of Weights and Measures since February, 1969 and among his duties are the following:

(a) Periodic inspections of wholesale warehouses to determine whether or not there is compliance with state laws and regulations with respect to quantities of products delivered to the general public.

(b) Detecting violations of the California Administrative Code and, in particular, Title 4, Chapter 8, Sub Chapter 2, Article 5 thereof pertaining to Weights and Measures.

3. In connection with his inspections and determination of fair and accurate weights and measures he uses the criteria set forth in Title 4, Chapter 8, Sub Chapter 2, Article 5 of the California Administrative Code, and in particular utilizes the procedure set forth therein at Section 2933.3, and sub-sections thereof, records the data taken as a result of the tests specified therein and takes appropriate action as set forth therein.

4. On October 16, 1972, in the ordinary course of his business, he went to the A. M. Lewis Company warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, All Purpose Gold Medal, General Mills 10 pound bags, Code #C207A1, A212A1.

Bag No. 1 minus 2¼ ounces	Bag No. 21 minus 1½ ounces
Bag No. 2 minus 1½ ounces	Bag No. 22 minus 1¼ ounces
Bag No. 3 minus 1¾ ounces	Bag No. 23 minus 1¾ ounces
Bag No. 4 minus 1¾ ounces	Bag No. 24 minus 2 ounces
Bag No. 5 minus 1½ ounces	Bag No. 25 minus 1½ ounces
Bag No. 6 minus 2 ounces	Bag No. 26 minus 1½ ounces
Bag No. 7 minus 2 ounces	Bag No. 27 minus 1¾ ounces
Bag No. 8 minus 1¼ ounces	Bag No. 28 minus 2 ounces
Bag No. 9 minus 1½ ounces	Bag No. 29 minus ¾ ounce
Bag No. 10 minus 1¾ ounces	Bag No. 30 minus ¾ ounce
Bag No. 11 minus 1¼ ounces	Bag No. 31 minus ¾ ounce
Bag No. 12 minus 1 ounce	Bag No. 32 minus 1¾ ounces
Bag No. 13 minus 1¾ ounces	Bag No. 33 minus 1½ ounces
Bag No. 14 minus 1¾ ounces	Bag No. 34 minus ¾ ounce
Bag No. 15 minus 1¾ ounces	Bag No. 35 minus 1½ ounce
Bag No. 16 minus 1¾ ounces	Bag No. 36 minus 1¾ ounces
Bag No. 17 minus 2¼ ounces	Bag No. 37 minus 2¾ ounces
Bag No. 18 minus ¾ ounce	Bag No. 38 minus 2 ounces
Bag No. 19 minus 1½ ounces	Bag No. 39 minus 2¼ ounces
Bag No. 20 minus 1¼ ounces	Bag No. 40 minus 2¼ ounces

This was a random sampling of an 1140 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, Self rising Pillsbury's Best, The Pillsbury Company, 5 pound bags, Code No. F2G08

Bag No. 1 minus $\frac{7}{8}$ ounce	Bag No. 8 minus $1\frac{1}{2}$ ounces
Bag No. 2 minus $1\frac{1}{4}$ ounces	Bag No. 9 minus $1\frac{1}{2}$ ounces
Bag No. 3 minus $\frac{3}{4}$ ounce	Bag No. 10 minus $1\frac{1}{8}$ ounces
Bag No. 4 minus 2 ounces	Bag No. 11 minus 2 ounces
Bag No. 5 minus $1\frac{3}{4}$ ounces	Bag No. 12 minus $1\frac{5}{8}$ ounces
Bag No. 6 minus $1\frac{1}{4}$ ounces	Bag No. 13 minus $1\frac{3}{4}$ ounces
Bag No. 7 minus $\frac{7}{8}$ ounce	Bag No. 14 minus $1\frac{5}{8}$ ounces
	Bag No. 15 minus $1\frac{1}{2}$ ounces

This was a random sampling of a 200 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(c) Flour, All Purpose Pillsbury's Best, The Pillsbury Company 10 pound bags, Code B2G16

Bag No. 1 minus $1\frac{3}{4}$ ounces	Bag No. 6 minus $1\frac{5}{8}$ ounces
Bag No. 2 minus $1\frac{1}{4}$ ounces	Bag No. 7 minus $2\frac{1}{4}$ ounces
Bag No. 3 minus $1\frac{1}{2}$ ounces	Bag No. 8 minus $2\frac{1}{2}$ ounces
Bag No. 4 minus $1\frac{1}{2}$ ounces	Bag No. 9 minus $\frac{7}{8}$ ounce
Bag No. 5 minus 1 ounce	Bag No. 10 minus 1 ounce

This was a random sampling of a 35 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(d) Flour, Whole Wheat Flour, The Pillsbury Company 5 pound bag, Code #F22S15

Bag No. 1 minus $\frac{1}{8}$ ounce	Bag No. 6 minus $\frac{1}{8}$ ounce
Bag No. 2 minus $\frac{5}{8}$ ounce	Bag No. 7 minus $\frac{1}{2}$ ounce
Bag No. 3 minus $\frac{1}{8}$ ounce	Bag No. 8 minus $1\frac{3}{8}$ ounces
Bag No. 4 minus $\frac{1}{4}$ ounce	Bag No. 9 minus 1 ounce
Bag No. 5 minus $\frac{7}{8}$ ounce	Bag No. 10 minus $\frac{5}{8}$ ounce

This was a random sampling of a 45 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(e) Flour, unbleached, Pillsbury's Best, Pillsbury Company 5 pound bag, Code #62607

Bag No. 1 minus $1\frac{1}{8}$ ounces	Bag No. 6 minus $\frac{3}{4}$ ounce
Bag No. 2 minus $1\frac{1}{8}$ ounces	Bag No. 7 minus $1\frac{3}{4}$ ounces
Bag No. 3 minus $\frac{7}{8}$ ounce	Bag No. 8 minus 1 ounce
Bag No. 4 minus $\frac{5}{8}$ ounce	Bag No. 9 minus $\frac{3}{4}$ ounce
Bag No. 5 minus 1 ounce	Bag No. 10 minus $\frac{1}{2}$ ounce

This was a random sampling of an 80 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

5. On October 17, 1972, in the ordinary course of his business, he went to the A. M. Lewis Company warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, all purpose, Gold Medal, General Mills, Inc., 10 pound bags, Code B231A1, B224A1

Bag No. 1 minus $1\frac{3}{4}$ ounces	Bag No. 26 minus $1\frac{1}{4}$ ounces
Bag No. 2 minus $1\frac{1}{8}$ ounces	Bag No. 27 minus $1\frac{7}{8}$ ounces
Bag No. 3 minus $1\frac{1}{4}$ ounces	Bag No. 28 minus $\frac{1}{2}$ ounce
Bag No. 4 minus $1\frac{1}{2}$ ounces	Bag No. 29 minus $\frac{3}{4}$ ounce
Bag No. 5 minus $1\frac{5}{8}$ ounces	Bag No. 30 minus $1\frac{1}{8}$ ounces
Bag No. 6 minus $\frac{7}{8}$ ounce	Bag No. 31 minus $1\frac{1}{4}$ ounces
Bag No. 7 minus $\frac{7}{8}$ ounce	Bag No. 32 minus $\frac{3}{4}$ ounce
Bag No. 8 minus $1\frac{1}{8}$ ounces	Bag No. 33 minus $1\frac{1}{2}$ ounces
Bag No. 9 minus $1\frac{1}{2}$ ounces	Bag No. 34 minus $2\frac{1}{8}$ ounces
Bag No. 10 minus $\frac{3}{4}$ ounce	Bag No. 35 minus $1\frac{1}{2}$ ounces
Bag No. 11 minus $\frac{7}{8}$ ounce	Bag No. 36 minus $1\frac{1}{8}$ ounces
Bag No. 12 minus $\frac{7}{8}$ ounce	Bag No. 37 minus $1\frac{3}{8}$ ounces
Bag No. 13 minus $1\frac{1}{8}$ ounce	Bag No. 38 minus $1\frac{1}{8}$ ounces

Bag No. 14 minus 1¼ ounces	Bag No. 39 minus 1¼ ounces
Bag No. 15 minus ¾ ounce	Bag No. 40 minus 1¼ ounces
Bag No. 16 minus ¾ ounce	Bag No. 41 minus 2¾ ounces
Bag No. 17 minus 1½ ounces	Bag No. 42 minus ¾ ounce
Bag No. 18 minus 1¼ ounces	Bag No. 43 minus 1¼ ounces
Bag No. 19 minus 1½ ounces	Bag No. 44 minus ¾ ounce
Bag No. 20 minus 1¾ ounces	Bag No. 45 minus 1¼ ounces
Bag No. 21 minus 1½ ounces	Bag No. 46 minus ¾ ounce
Bag No. 22 minus 1¾ ounces	Bag No. 47 minus ¾ ounce
Bag No. 23 minus 1½ ounces	Bag No. 48 minus ¾ ounce
Bag No. 24 minus 1¾ ounces	Bag No. 49 minus 1¾ ounces
Bag No. 25 minus 1 ounce	Bag No. 50 minus 1½ ounces

This was a random sampling of a 2865 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, unbleached, Pillsbury's Best, The Pillsbury Company 5 pound bags, Code #F2G22, G2G21

Bag No. 1 minus ¾ ounce	Bag No. 16 minus ¾ ounce
Bag No. 2 plus 0 ounces	Bag No. 17 minus 7/8 ounce
Bag No. 3 minus 1 ounce	Bag No. 18 minus 7/8 ounce
Bag No. 4 minus 2 ounces	Bag No. 19 minus ¾ ounce
Bag No. 5 plus 1/8 ounce	Bag No. 20 minus ¾ ounce
Bag No. 6 minus 1¾ ounces	Bag No. 21 minus ¾ ounce
Bag No. 7 plus ¼ ounce	Bag No. 22 minus ½ ounce
Bag No. 8 minus 1½ ounces	Bag No. 23 minus 1½ ounces
Bag No. 9 minus 1 ounce	Bag No. 24 minus 1 ounce
Bag No. 10 minus 1¾ ounces	Bag No. 25 minus 7/8 ounce
Bag No. 11 minus 1¾ ounces	Bag No. 26 minus 1¼ ounces
Bag No. 12 minus 1¼ ounces	Bag No. 27 minus 7/8 ounce
Bag No. 13 minus 2 ounces	Bag No. 28 minus 1½ ounces
Bag No. 14 minus 1½ ounces	Bag No. 29 minus ¾ ounce
Bag No. 15 minus 1¾ ounces	Bag No. 30 minus 1 ounce

This was a random sample of an 800 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

6. On November 28, 1972, in the ordinary course of his business he went to the A. M. Lewis Company

warehouse, 2727 Kansas Street, Riverside, California, and with the assistance of Weights and Measures' Inspector, S. B. Otterness, also of the Riverside County Department of Weights and Measures, inspected the following items for correct and accurate quantity.

(a) Flour, enriched, Gold Medal General Mills, Inc. 50 pound cloth bag, Code D225A1

Bag No. 1 minus 6 ounces	Bag No. 7 minus 6 ounces
Bag No. 2 minus 2 ounces	Bag No. 8 minus 2 ounces
Bag No. 3 minus 4 ounces	Bag No. 9 plus 0 ounces
Bag No. 4 minus 4 ounces	Bag No. 10 minus 4 ounces
Bag No. 5 plus 0 ounces	Bag No. 11 minus 8 ounces
Bag No. 6 minus 8 ounces	Bag No. 12 plus 0 ounces

This was a random sample of a 19 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(b) Flour, unbleached, Pillsbury Company 5 pound bag, Code #G2G05

Bag No. 1 minus 17/8 ounces	Bag No. 16 minus 1 ounce
Bag No. 2 minus 7/8 ounce	Bag No. 17 minus 1½ ounces
Bag No. 3 minus ½ ounce	Bag No. 18 plus 5/8 ounce
Bag No. 4 minus 15/8 ounces	Bag No. 19 minus 1½ ounces
Bag No. 5 minus 1½ ounces	Bag No. 20 minus ½ ounce
Bag No. 6 minus 1¾ ounces	Bag No. 21 minus 1¼ ounces
Bag No. 7 minus 15/8 ounces	Bag No. 22 minus ¼ ounce
Bag No. 8 minus 2¼ ounces	Bag No. 23 minus 1¼ ounces
Bag No. 9 minus 1¾ ounces	Bag No. 24 minus 1½ ounces
Bag No. 10 minus 1 ounce	Bag No. 25 minus 7/8 ounce
Bag No. 11 minus 1½ ounces	Bag No. 26 minus 1¼ ounces
Bag No. 12 minus 7/8 ounce	Bag No. 27 minus 1¾ ounces
Bag No. 13 minus ½ ounce	Bag No. 28 minus 5/8 ounce
Bag No. 14 plus ½ ounce	Bag No. 29 minus 5/8 ounce
Bag No. 15 minus 1½ ounces	Bag No. 30 minus 1 ounce

This was a random sample of an 800 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(c) Flour, enriched, Gold Medal, General Mills, Inc. 50 pound cloth bag, Code #D225A1

Bag No. 1 minus 12 ounces	Bag No. 6 minus 10 ounces
Bag No. 2 minus 20 ounces	Bag No. 7 minus 6 ounces
Bag No. 3 minus 12 ounces	Bag No. 8 minus 8 ounces
Bag No. 4 minus 6 ounces	Bag No. 9 minus 12 ounces
Bag No. 5 minus 6 ounces	Bag No. 10 minus 8 ounces

This was a random sample of an 18 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

(d) Flour, Gold Medal, General Mills, Inc. 10 pound bags, No Code.

Bag No. 1 plus 0 ounces	Bag No. 23 plus 0 ounces
Bag No. 2 minus ¼ ounce	Bag No. 24 plus 0 ounces
Bag No. 3 plus ⅛ ounce	Bag No. 25 minus ¾ ounce
Bag No. 4 minus ¼ ounce	Bag No. 26 minus ¾ ounce
Bag No. 5 minus ½ ounce	Bag No. 27 minus ⅛ ounce
Bag No. 6 minus ⅛ ounce	Bag No. 28 minus ¾ ounce
Bag No. 7 minus ⅛ ounce	Bag No. 29 plus 0 ounces
Bag No. 8 plus ¾ ounce	Bag No. 30 minus ½ ounce
Bag No. 9 plus ½ ounce	Bag No. 31 minus 1 ounce
Bag No. 10 plus ⅞ ounce	Bag No. 32 minus ⅝ ounce
Bag No. 11 plus 0 ounces	Bag No. 33 minus ¾ ounce
Bag No. 12 plus ⅝ ounce	Bag No. 34 minus ¾ ounce
Bag No. 13 plus 0 ounces	Bag No. 35 minus ⅛ ounce
Bag No. 14 minus ⅛ ounce	Bag No. 36 minus ⅛ ounce
Bag No. 15 plus ⅛ ounce	Bag No. 37 minus ¾ ounce
Bag No. 16 minus ¾ ounce	Bag No. 38 minus ¼ ounce
Bag No. 17 minus ¼ ounce	Bag No. 39 minus 1 ⅛ ounces
Bag No. 18 minus ⅛ ounce	Bag No. 40 minus ⅛ ounce
Bag No. 19 minus 4 ⅛ ounces	Bag No. 41 plus ¾ ounce
Bag No. 20 plus 0 ounces	Bag No. 42 plus ⅞ ounce
Bag No. 21 minus ⅛ ounce	Bag No. 43 plus ¼ ounce
Bag No. 22 minus ¼ ounce	Bag No. 44 minus ½ ounce
	Bag No. 45 minus ⅛ ounce

This was a random sample of an 1100 bag lot. The lot was removed from sale in accordance with Section 12211 of the California Business and Professions Code.

8. In each of the above-mentioned inspections he used an equal arm knife-edged balance or a knife-edged platform type balance for the purpose of weighing the quantities of food stuffs hereinabove set forth. Said equal-arm balance is marked in units of 1/8 ounce. Said platform type balance is marked in units of 1 ounce. In each case hereinabove set forth, he read and interpreted the scale on the said balances in favor of the packing company where the indicator on said balances was between scale divisions. In other words, he read the scale as the lower number of short weight rather than the higher number where the indicator was between scale divisions.

9. In each case hereinabove set forth the bags of food stuff picked to be inspected were taken by the use of a random table of numbers or by visual random picking of the bags.

10. In making his off-sale orders as above described, he relied solely upon the authority granted to the Director of Weights and Measures under Section 12211 of the California Business and Professions Code.

11. Off-sale orders are attached hereto marked Exhibit "B", and incorporated herein by reference.

Executed on this 19th day of April, 1973, at Riverside, California.

/s/ Erwin V. Miller
ERWIN V. MILLER

Subscribed and sworn to before me this 19th day of April, 1973.

/s/ Anita L. Fullinwider
ANITA L. FULLINWIDER

Notary Public in and for Said County and State

[Seal]

CALIFORNIA DEPARTMENT OF AGRICULTURE
BUREAU OF WEIGHTS AND MEASURES

OFF SALE ORDER

COUNTY Riverside No. 001802

DATE 10-16-72 TIME 100 ^{AM} P.M.

1. TO A M Lewis
ADDRESS 2727 Kansas
Riverside

2. A M Lewis
ADDRESS 2727 Kansas
Riverside

WARNING Under authority of Secs. 12025.5, B & P Code
This lot has been ordered off sale. Do not remove this tag or in any way dispose of the containers without authorization from a Weights and Measures Official. (Sec. 12025.5, B & P Code of Calif. Maximum penalty \$500.00 or 6 months in jail or both.)

COMMODITY Flour BRAND NAME Gold Medal
PACKER/ADDRESS General Mills
Minneapolis, Minn. 55440

NUMBER OF CONTAINERS 1140 MARKED CONTENT 10 lb

OTHER IDENTIFICATION C257A1, A212A1
EXACT LOCATION flour section

VIOLATION(S) Sec. 12024 Calif.
B & P Code - Short wt.

HOLD TAG ISSUED YES ☒ NO ☐ (OFFICER) Blumen

ADDRESS 2950 Washington PHONE 777-2630

I HEREBY AGREE TO Hold until

released by W & M

(SIGNED) [Signature] POSITION [Signature]

WHITE - To County Sealer issuing order
GOLDENROD - To County or State of Final Destination
PINK - To State Bureau of Weights and Measures
YELLOW - To Person in Possession
CARD - To Issuing County after Receipt
524-002 Rev. 10/71

ARTICLE V PACKAGE INSPECTION REPORT	DATE	TIME	CATEGORY NO.
20615	1802	10/16/73	6, 06
COUNTY Riverside			

PACKER	General Mills, Inc.	ADDRESS	Minneapolis, Minn 554
DISTRIBUTOR	A M Lewis	ADDRESS	Kansas, Riverside
DEALER		ADDRESS	
BRAND NAME	Gold Medal	COMMODITY	all purpose flour
OTHER IDENTIFICATION—CODE SYMBOL	C207A1, 0213A1	CONTAINER DESCRIPTION	paper bag
		MARKED CONTENTS	10 lb

LOT, SAMPLE & TARE SAMPLE SIZES	1140	40	5	PACKAGES REJECTED	(40) 1140
UNIT OF MEASURE		1/2 lb		PACKAGES WEIGHED OR MEASURED IN SAMPLING	(40) 40
PRICE PER UNIT, \$	NO	PER		LOT PASSED	<input type="checkbox"/> LOT REJECTED
AVG. TARE	7 1/2	5	= 1 1/2	HOW MANY HOLD TAGS ISSUED	1

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	PRELIM.	CORR.
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	98	+
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	112	+
+	11	12	11	10	11	12	13	12	13	12	13	12	13	12	13	95	+
+	14	13	12	11	12	13	12	13	12	13	12	13	12	13	12	95	+
+	12	11	10	11	12	13	12	13	12	13	12	13	12	13	12	101	+
+	7	6	7	11	6	11	11	4								501	+
BC																-501	

AVG. RANGE—PRELIM. (15/10)	TABLE II	TOTAL ERROR—PRELIM	AVG. ERROR (15/10)	TABLE III	AVG. ERROR	TOTAL ERROR—CORR.
63, 8 = 7.8	6.53	-501	-501, 40 = 12.5			
AVG. RANGE—CORRECTED	TABLE IV	TABLE V	% OF LOT SAMPLED (15/10)	TABLE VI	TABLE VII	TABLE VIII
1			(1)			

DISPOSITION OF OFF-SALE MERCHANDISE:		3. To be shipped on or about _____ to distributor <input type="checkbox"/>	
1. Corrected and released for sale this date _____ <input type="checkbox"/>		Packer <input type="checkbox"/>	
2. To be corrected locally on or about _____ by _____		4. Disposition not determined. Lot is not to be moved or in any way disposed of without written authorization from this office. <input checked="" type="checkbox"/>	
Packer <input type="checkbox"/> Distributor <input type="checkbox"/> Dealer <input type="checkbox"/>			

INVESTIGATION OF COMPLAINT FROM	INITIATED BY	THEIR OSD NO.	PHONE CALL/LETTER DATED
Remarks: Total Error minus			
No. of unreasonable minus errors			
exceeds tare sample size			
Shipped to General Mills 4309 Fruitland St 4-3-73 00133			
Owner or Agent	Title	SEALER: O W Jones	
This is to Certify that in accordance with the law, I have tested, weighed, or inspected packages, or containers and have passed, seized, or condemned them as above set forth.		By: J B Otterson	

WHITE—COUNTY RECORD	CALIFORNIA DEPARTMENT OF AGRICULTURE	EXHIBIT 1134
YELLOW—TO STATE	BUREAU OF WEIGHTS AND MEASURES	-18- 54
PINK—TO STATE - OR TO		

BEST COPY AVAILABLE

CERTIFICATE OF SERVICE BY
MAIL AND EXHIBITS B 14-23
ARE OMITTED.

**Affidavit of Donald B. Colpitts in Opposition to
Preliminary Injunction.**

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

State of Minnesota, County of Hennepin—ss:

DONALD B. COLPITTS, being first duly sworn according to law, deposes and says:

I reside at 17830-24th Ave. No., Wayzata, Minnesota 55391. I am a graduate of Whitworth College, located in Spokane, Washington, where I majored in chemistry and received the degree of Bachelor of Science in 1939. I am a member of the American Association of Cereal Chemists, and have served as Secretary, Treasurer, Vice-Chairman and Chairman of the Pacific-Northwest regional section of that association.

I have been employed by General Mills, Inc. since 1939. From 1939 to 1948, except for a period of about four years of military service, I was employed in the capacity of cereal chemist; from 1948 to 1964 I was Quality Control Manager of the flour mill of General Mills, Inc., at Spokane, Washington; from 1964 to 1965 I was Supervisor of the Physical Testing Laboratory in the Quality Control Department of General Mills, Inc. in Minneapolis; and since 1965 I have been and am Technical Manager, Weights & Measures, for General Mills, Inc.

My present duties include, among others, supervision of the weight quality attributes of family flour products, supervision of the physical testing laboratory of the Quality Control Department and Technical Services, and supervision over the experimental bake shop and the commercial bake shop, all at the James Ford Bell Technical Center of General Mills, Inc. in Golden Valley, Minnesota.

I am familiar with the custom and practice followed by plaintiffs in the process of wheat flour milling, weighing and packaging, and with the equipment used. All flour ordered off-sale in Riverside County was "family flour"—that is, it was to be sold at retail. All this flour was made in states of the United States; none was made in a Territory of the United States.

The raw material from which wheat flour is made is the kernel (or berry) of wheat plant. A kernel of wheat is composed of three major parts. About 83 per cent is endosperm, which is the part from which white flour is made; about 14½ per cent is pericarp, sometimes referred to as bran, being the outside portion of the kernel, principally used for animal feed; and about 2½ per cent is wheat germ. As acquired by plaintiffs from the farmer or grain merchant, the kernel normally has a moisture content in the range of 10-14.5 per cent by weight, averaging about 12½ per cent.

In the milling operation the objective is to separate and process these parts of the kernel into the desired products. In a modern mill this is accomplished by highly mechanized machinery and equipment. Wheat flour is made by milling (grinding) the wheat kernel and by sifting (bolting) and separating the bran and

the germ from the endosperm—the latter becoming the flour.

In order to make the required separation and to obtain the best milling results it is necessary that the wheat to be milled be "tempered" by adding a carefully calculated amount of water to the wheat and allowing the wheat to set in tempering bins long enough for the moisture to penetrate the wheat kernel, toughen the bran coat and germ to facilitate separation, and render the endosperm more friable for easier and better reduction into the fine particles required for flour. Wheat usually is tempered to around 15 to 16 per cent moisture for best milling results. The amount of water to be added depends on the moisture content of the wheat, the kind of wheat, the desired mix of products, relative humidity conditions in the mill, and the judgment of the miller.

If not enough water is added, the pericarp will not be sufficiently toughened, some bran will break down into flour size particles and mix in with the flour, and the endosperm will not be sufficiently friable, or "mellow", for optimum reduction. If too much water is added, too much of the endosperm will adhere to the bran, making an optimum separation of the endosperm from the pericarp impossible and therefore decreasing the yield of flour.

In the course of the milling operation the moisture content of the tempered wheat decreases. Flour comes off the mill and flows to the weighing and packing machinery at approximately 13 to 14 per cent moisture content.

Under the definitions and standards of identity established for wheat flours by the Food and Drug Adminis-

tration pursuant to the Federal Food, Drug and Cosmetic Act (21 C.F.R. Part 15, Subpart A) the maximum moisture content of wheat flour is 15 per cent. However, flour of a kind involved in this action is not produced with a moisture content as high as 15 per cent because to bring flour off the mill with a moisture content that high would require so high a moisture content in the tempered wheat as to foreclose good milling results.

The following Findings of Fact, printed in the Federal Register of Tuesday, May 27, 1941, at the time of adoption of Part 15, are descriptive of today's practices:

"Findings of Fact"

- "1. The food commonly and usually known as 'flour', 'white flour', 'wheat flour', or 'plain flour', is manufactured from wheat, both hard and soft, other than durum wheat and red durum wheat.
- "3. In making flour the wheat is first cleaned. It is usually tempered. It is then ground and bolted so as to separate the inner portion of the wheat berry, known as the endosperm, from the outer portions, known as the bran coat, or from both bran coat and germ. Flour consists essentially of finely ground endosperm. In the milling process the separation of bran coat and germ from endosperm is never complete, but a certain degree of separation is necessary to produce flour which will make acceptable white bread and biscuit.
- "4. Where all the flour milled from the wheat used is combined without separation into grades, the flour is called 'straight flour'. That portion which

is most nearly free of bran coat and germ is frequently taken off and sold as 'patent flour'. The remaining portion, which contains more bran coat and germ than straight flour, is known as 'clear flour'.

- "5. 'Straight flours' will make acceptable white bread and biscuit. As the degree of removal of bran coat and germ is lessened, flours become progressively less desirable for such purposes until so much bran coat and germ remain that acceptable white bread and biscuit cannot be made. However, such products are suitable for other food uses and are usually sold under such designations as 'low-grade flour' and 'second clear flour'. Products containing even more bran coat and germ are sold usually as animal feed."

The following Findings of Fact (from the source cited above) also are descriptive of today's practices, except that the Air Oven Method has become equally acceptable with the Vacuum Oven Method:

- "12. All flour contains some moisture. Excessive moisture, however, impairs the keeping quality of flour and unnecessarily increases its weight. A reasonable limit for moisture, which is not exceeded in good milling practice, is 15 per cent.
- "16. A satisfactory and reliable method for determination of moisture in flour is that prescribed in the book 'Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists', 4th Edition, 1935, page 206, under the caption 'Vacuum Oven Method—Official'. The same method has recently been re-

published in the book 'Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists', 5th Edition, 1940, page 211, under the caption 'Vacuum Oven Method—Official'. This method is well-known and widely used when examining flour for its moisture content."

Flour has the capacity and tendency to gain or lose moisture depending upon the atmospheric conditions surrounding it. The rate of moisture loss or gain depends upon the temperature and the amount of moisture in the air around it. A particular package of flour will therefore vary in weight from time to time depending on the relative humidity to which it is exposed. If the weight of the contents of the package when packed is equal to the stated net weight, and if it is thereafter held in a warehouse or on a retail shelf in an area of low relative humidity, evaporation will occur and the weight of the contents will decline accordingly. Upon subsequent exposure to higher relative humidities it will regain moisture, but at a slower rate.

This hygroscopic characteristic of flour is generally recognized and well documented. There have been a number of scientific and practical studies made with regard to moisture loss and gain of flour and, based upon my own familiarity with moisture loss and gain, I believe the attached Exhibits A and B accurately reflect what happens to flour under various atmospheric conditions. The essence of these exhibits, and of my experience, is that the gain or loss of moisture can cause the net weight of contents of packages of flour to fluctuate 3-4 per cent or more during the course of good distribution practice within the conti-

mental United States. It is for this reason that laws and regulations provide for reasonable variations caused by loss or gain of moisture during good distribution practices.

Exhibit A is a copy of a paper entitled "A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Relative Humidities", by C. A. Anker and W. F. Geddes, with C. H. Bailey, reprinted from Cereal Chemistry, Vol. XIX, No. 1, January 1942, which reports the results of studies conducted under controlled humidity conditions to determine the changes in net weight and moisture content of an 83 per cent patent flour, commercially milled from a blend of hard red spring and hard winter wheats for the family trade and normally sold in 5, 10 and 24½ pound paper and cotton sacks. The kinds of flour and packages used in the studies were similar to those described in the counterclaim, motion for preliminary injunction and supporting affidavits filed by the defendant and counterclaimant in this action. This Anker, Geddes and Bailey paper has been and is now accepted in scientific circles as an authoritative treatise on the hygroscopicity of flour.

Table IX (at page 147) of the Anker, Geddes and Bailey paper shows the percentage of overpacking that would be required to insure 100 per cent of the required weight at varying relative humidities with flour packed at moisture contents of from 13.0 per cent to 15.0 per cent. The table demonstrates that flour packed at 13.5 per cent moisture content would have to be maintained at a relative humidity of over 60 per cent to prevent loss in weight. Overpacking of 8.8 per cent would be required if the flour were maintained in a relative humidity of 10 per cent, as

compared to a required overpack of only 0.3 per cent if maintained in a relative humidity of 60 per cent. If maintained in relative humidities above 60 per cent no evaporation would occur and no overpacking would be required.

Exhibit B is entitled "Report of Flour Test" and was furnished to me in 1969 by the head of Weights and Measures of the State of Colorado, who stated that he had caused the tests to be conducted. This shows the weight of four sacks of flour taken on weekdays from April 17, 1969 through May 7, 1969, as well as the relative humidity and the temperature in degrees Fahrenheit on each such day.

Unless the relative humidity of the atmosphere at any particular location is rigidly controlled by artificial means, which is difficult if not impossible to accomplish, the relative humidity at that location will vary from time to time, almost always from night to day and vice versa, usually from day to day, and often from hour to hour.

The relative humidity of the unenclosed or outside atmosphere in some areas in the United States during some seasons sometimes falls below the 60 per cent "equilibrium" point required to prevent loss of weight by evaporation in flour packed at 13.5 per cent moisture content. The relative humidity in warehouses and retail stores in the United States sometimes falls below the relative humidity of the outside atmosphere in the same area. Heating, ventilating, air conditioning and artificial humidification of a warehouse or store in any area will affect the relative humidity in such warehouse or store. Relative humidities as low as 30 per cent, or lower, even though not customary, sometimes occur in some warehouses and retail stores in some areas.

When the contents of a package of flour lose weight by reason of exposure to an atmosphere having a low relative humidity, nothing is lost but moisture. All ingredients contained in the package when packed, whether extracted from the wheat or added in the manufacturing process, except some part of the moisture, remain in the package. The nutritional value is the same. Flour as such is not consumed separately as a human food but is invariably used as an ingredient in preparing some other food, and water or some other liquid or both are invariably added in the process. The consumer loses nothing of value by reason of the evaporation. When flour is used a slight increase in water added compensates for any moisture loss.

If the moisture content of packaged flour at the time of packing is known, if the weight of the flour at a later time is determined, and if the moisture content of the flour at such later time is also determined, the weight of the flour at the time of packing can be accurately determined mathematically.

On October 24, 1972, together with Charles E. Joyce of The Pillsbury Company, and Henry Sumpter, Jr. of Seaboard Allied Milling Corporation, I called upon Joseph W. Jones, Director, Riverside County Department of Weights and Measures, for the purpose of securing his cooperation in obtaining samples of flour which Mr. Jones' office had ordered off-sale as being short-weight on October 16 and 17, 1972. Mr. Jones assigned an inspector who went with the three of us to the A. M. Lewis warehouse, 2727 Kansas, Riverside, and to the Certified Grocers warehouse, 1990 Pomona Rincon Road, Corona. At each of these warehouses, the inspector selected unopened bags at random from the lots which had been ordered off-sale, the

inspector initialed each bag, and we three milling representatives then took these bags to Geo. W. Gooch Laboratories, Ltd. in Los Angeles, California, where we explained to the laboratory representatives that we desired gross, tare and net weights of each bag as is, and a thorough mixing of each bag's contents in order to obtain a sample from each bag for Gooch to run a moisture determination using an official method of the Association of Official Agricultural Chemists.

Exhibit A attached to the Affidavit of Roger C. Miller is a copy of the Gooch Laboratories' report as to these samples of flour.

I ascertained from the General Mills records the milling moisture content for the date indicated for those bags of General Mills flour for which a code was provided (and used the lowest of these milling moistures for the samples from the lot where no code was noted) and I calculated the net weight of contents at which each bag sampled was packed. These calculations show that each package of General Mills flour which was ordered off-sale bore a label containing an accurate statement of the quantity of the contents in terms of weight when packed, distributed and sold by General Mills, Inc., as shown on the attached Exhibit C.

None of the General Mills flour was owned or controlled by General Mills, Inc. when inspected by Jones.

All the weight shortages supposedly found by Jones' inspectors in packages of General Mills flour (averaging between .125 per cent and 1.250 per cent per lot) were well within the range of reasonable variation from labeled net weight which occurs to flour by loss of moisture during the course of good distribution practices.

I also ascertained from Charles E. Joyce the milling moisture content for the date indicated for those bags of Pillsbury flour which had been ordered off-sale, and I also ascertained from Henry Sumpter, Jr. the milling moisture content for the date indicated for those bags of Seaboard Allied flour which had been ordered off-sale, and I calculated the net weight of contents at which each bag sampled was packed. These calculations show that each package of Pillsbury and/or Seaboard Allied flour which was ordered off-sale bore a label containing an accurate statement of the quantity of the contents in terms of weight when packed, distributed and sold by the Pillsbury Company or Seaboard Allied Milling Corporation, as shown on the attached Exhibit C.

/s/ Donald B. Colpitts
Donald B. Colpitts

Sworn to and subscribed before me this 14th day of May, 1973.

/s/ Annabelle J. Johnson
Notary Public

/s/ Annabelle J. Johnson
Notary Public

ANNABELLE J. JOHNSON

Affidavit of Joseph W. Jones.*

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs, vs. Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Defendant.

Joseph W. Jones, as Director of the County of Riverside Department of Weights and Measures, Counterclaimant, vs. General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Counterdefendants. Civil Action No. 73-715-R.

State of California, County of Riverside—ss.

Joseph W. Jones, being first duly sworn, states as follows:

1. He is the defendant and counterclaimant in this proceeding. He is now and at all times herein mentioned was the duly appointed, qualified and acting Director of the Department of Weights and Measures for the County of Riverside, State of California.

2. The purpose of this affidavit is to explain the procedures followed in Riverside, California, in the handling by a retailer or distributor of packaged food products after such packages are ordered off-sale by the Riverside County Director of Weights and Measures.

3. The manager of the retail establishment or of the distributing company is informed by the inspector

*Certificate of service by mail is omitted.

from the Department of Weights and Measures that the merchandise has failed to qualify under accepted checking procedures and that it is therefore off-sale. The reasons for the failure to qualify are explained to the manager. He is advised that the merchandise must be removed from the sales area of the store until the misbranding is corrected or until the manager has disposed of the merchandise. The manager is informed as to the alternatives available under California law to bring the off-sale merchandise into compliance.

4. The manager may return the product to the distributor or packer from whom procured; or he may re-mark each package with an accurate statement of the quantity; he may dump or destroy the product; or he may "bulk the product out" and sell in that state. Most managers choose to return the product unopened to the packer or his distributor. Some managers avail themselves of the other options, especially if only a small number of packages are involved. It is the policy of Jones' office to make clear to the store manager that the off-sale merchandise still belongs to the store even though ordered off-sale and that the retention or disposition of the merchandise within the limitations imposed by law is simply a matter of the store's own choice. Certain products cannot be re-marked because of the restrictions imposed by Business and Professions Code, section 13000, which restricts the size of packages in which flour may be sold to five, ten, twenty-five, fifty and one hundred pound packages.

5. The manager is required to notify Jones' office as to when he will pick up the off-sale merchandise, the name of the carrier, the destination of the product,

and its approximate arrival time. Jones' office receives many inquiries from retailers and distributors as to the methods available for the handing of off-sale merchandise. Advice is given as above outlined.

Executed on this 6th day of August, 1973, at Riverside, California.

/s/ Joseph W. Jones

Joseph W. Jones

Subscribed and sworn to before me this 6th day of August, 1973.

/s/ Anita L. Fullinwider

ANITA L. FULLINWIDER

Notary Public in and for
said County and State

[Seal]

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

FINDINGS OF FACT

1. Plaintiff General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

2. Defendant Joseph W. Jones, hereafter Jones, is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action was instituted and arises under 21 U.S.C. §§ 301-392 (the Federal Food, Drug, and Cosmetic Act); this action is between citizens of different states; the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs; jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a); and venue is based on 28 U.S.C. § 1391. This is a civil action for a judgment

declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court. The Court has jurisdiction as to the counterclaim filed by Jones under 21 U.S.C. § 332 and has pendent or ancillary jurisdiction.

4. The flour in issue is a "food" under the Federal Food, Drug and Cosmetic Act [21 U.S.C. § 321(f)]; it is a "consumer commodity" under the federal Fair Packaging and Labeling Act [15 U.S.C. § 1459(a)]; and it conforms to definitions and standards of identity set forth in regulations (21 C.F.R. Part 15, Subpart A) of the Secretary of Health, Education and Welfare promulgated under the Federal Food, Drug and Cosmetic Act.

5. At all times pertinent to this proceeding, plaintiffs and counterdefendants and each of them, were engaged in the business of processing, packaging, selling, distributing and otherwise disposing of packages of wheat flour to the general public and to others for resale to the general public within the County of Riverside, State of California.

6. When introduced or delivered for introduction into commerce by the plaintiff and counterdefendant who manufactured it, each package of flour involved herein bore a label containing, among other things, a statement of the quantity of the contents in terms of weight, such as 2 pounds, 5 pounds, 10 pounds, 25 pounds and 50 pounds, and were distributed for sale to various food distributors in Riverside County, California.

7. The packages of flour mentioned in the counterclaim were inspected by inspectors employed by Jones

in his capacity of Director of the Department of Weights and Measures of the County of Riverside, thereafter the said packages were ordered "off sale" by Jones. The "off sale" orders made by the inspectors stated that the lots were ordered off sale under the authority of California Business and Professions Code, sections 12211 and 12607, and Title 4 California Administrative Code, Chapter 8, Subchapter 2, and in the manner prescribed by Business and Professions Code, section 12025.5. Said "off sale" orders were made while the goods were in the possession of distributors and not under the ownership or control of any plaintiff.

CONCLUSIONS OF LAW

1. Substantial doubts are created by the record in this action, involving both federal and State law, as to the merits of the relief claimed by Jones under his counterclaim. Because of such doubts, a preliminary injunction should not be granted (*Fowler v. United States* (C.D. Cal. 1966) 258 F. Supp. 638, 644).

2. No legal basis exists for a preliminary injunction at this time.

3. The status quo is that Jones is ordering flour "off sale" whenever he finds such packages to be under weight, acting pursuant to the authority of Business and Professions Code, sections 12211 and 12607, and Title 4 California Administrative Code, Chapter 8, Subchapter 2. Jones does not need a preliminary injunction to preserve this status quo pending a determination of the action on the merits, which preservation is the function of a preliminary injunction (*King v. Saddleback Junior College District* (9th Cir. 1970) 425 F.2d 426, 427).

4. Jones' motion for a preliminary injunction is denied.

Dated this 3rd day of July, 1973.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Amended Order.

United States District Court, Central District of California.

General Mills, Inc., a corporation; The Pillsbury Company, a corporation; Seaboard Allied Milling Corporation, a corporation, Plaintiffs and Counterdefendants, v. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant and Counterclaimant. Civil Action No. 73-715-R.

Pursuant to the Opinion of the United States Court of Appeals for the Ninth Circuit in cases Nos. 73-3583 and 74-1051, entered October 29, 1975, the order of this District Court in case No. 73-715-R hereby is amended to read as follows:

IT IS ORDERED:

(1) that the motion for a three-judge court is denied, since the constitutional issues raised in this case are not substantial;

(2) that the enforcement of valid state weights and measures laws through the use of off sale orders prior to a hearing or opportunity for judicial review does not unreasonably burden interstate commerce or violate the due process clause of the Fourteenth Amendment to the Constitution of the United States;

(3) that Title 21 Code of Federal Regulations § 1.8b(q) is valid;

(4) that, as to plaintiffs' flour products, Cal. Bus. and Prof. Code § 12211 and 4 Cal. Admin. Code, ch. 8, subch. 2 and subch. 2.1, impermissibly conflict with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 C.F.R. 1.8b(q);

(5) that, as to plaintiffs' flour products, enforcement of Cal. Bus. and Prof. Code § 12607 as implemented by 4 Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, impermissibly conflicts with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 C.F.R. 1.8b(q);

(6) that defendant, together with his successors, deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him, and each of them, are jointly and severally restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211, and/or the provisions of California Business and Professions Code section 12607 as implemented by 4 Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, and/or the provisions of Title 4, Cal. Admin. Code, ch. 8, subch. 2 and/or subch. 2.1, to the flour products of plaintiffs which have been labeled as to net weight in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., and/or of the federal Fair Packaging and Labeling Act, and/or any valid regulation promulgated pursuant thereto;

(7) that state net quantity labeling requirements, which are not in conflict with the Federal Food, Drug, and Cosmetic Act or the federal Fair Packaging and Labeling Act or any valid regulation promulgated pursuant thereto, and which are not less stringent than or do not require information different than that required by section 4 of the federal Fair Packaging and Labeling Act or regulations promulgated pursuant thereto, may be enforced by appropriate state procedures;

(8) that the motion of defendant for summary judgment is denied;

(9) except as herein expressly provided, the motion for summary judgment of plaintiffs is denied; and

(10) the Court reserves the continuing jurisdiction to make any modification to this injunction contained herein, upon proper application by any party and consonant with the Opinion of the Court of Appeals, as the ends of justice may require.

DATED: May 13, 1976.

MANUEL L. REAL

United States District Judge

Approved as to form:

Ray T. Sullivan, Jr., County Counsel, Riverside County
Loyal E. Keir, Deputy County Counsel

/s/ By: Loyal E. Keir

Attorneys for Joseph W. Jones

Order of United States District Court, dated September 17, 1973, is in the Appendix to the Petition, pages 53-55.

**Complaint for Declaratory Relief and Injunction Re:
Federal Wholesome Meat Act of 1967.**

72- 604- 122 R

Jury demand date:

D. C. Form No. 104 Rev

TITLE OF CASE		ATTORNEYS			
THE RATH PACKING COMPANY, a corporation,		For plaintiff:			
Plaintiff,		Gibson, Dunn & Crutcher			
VS		Sherman Welpton, Jr.			
THE PEOPLE OF THE STATE OF CALIFORNIA: JOSEPH W. JONES as Director of the County of Riverside Department of Weights and Measures,		Dean C. Dunlavey			
Defendants.		515 South Flower St., Los Angeles, Calif., 90071 (213) 620-9300			
		For defendant:			
		Ray T. Sullivan, Jr., County Counsel			
		3535 Tenth St. Riverside, Ca 92501			
COMPLT FOR DECLARATORY RELIEF AND IN-JUNCTION RE: FEDERAL WHOLESOME MEAT ACT OF 1967					
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DEPT.
J.S. 5 mailed	Clerk	4/1/72	401411	15 -	4/24/72
		4/1/72	12509	5 -	4/8/72
J.S. 6 mailed	Marshal	4/8/72	12637	5 -	4/24/72
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date Order or Judgment Made
3/17/72	Fld complt for declaratory relief and injunction re: Federal Wholesome Meat Act of 1967. MI JS-5. Issd sums.	
3/30/72	Fld Ord (R) (LTL) transig action to the calendar of Judge Lawrence T. Lydick for all fur prods. Nfld Pys.	
4/9/72	Fld retn of sums	
7/4/72	Fld prae for and issd alias sums. Fld request & Ord (RD) for service of process by other than UCN, naming Audrey Waite.	
12/18/72	Fld retn of alias sums.	
12/27/72	Fld Joseph W. Jones's ANSWER to complt.	
1/22/73	Fld note of PTC set for 3/19/73, 10am and mld cyps.	kh
3/5/73	CE ords final set 3/27/73, 9:30am & considtd w/72-607-R.	eam.
3/22/73	Fld pltf's note of mtn retnble 3/22/73, 9:30am and mld for sum judgment. Fld deft Joseph W. Jones's note of mtn retnble 3/22/73, 9:30am and mtn for sum judgment supporting memo and affid of John La Rose. Fld sd defts memo in support of mtn for sum judgment. Fld affid of John La Rose in support of defts mtn for sum judgment.	kh
3/26/73	Fld defts objections by Jones to Rath's errors.	kh
3/26/73	Fld pltf's stmt of genuine issues. Fld pltf's reply memo of pts and auth re mtns for sum judgment. Fld pltf's affid of Morris Y. Kinne.	kh kh
3/26/73	Counsel argue motions for summary judgment. Court orders both cases as to Becker & Jones Submitted.	rs
3/29/73	Fld deft's post hearing memo.	lab
6/30/73	Fld pltf's reply to Jones post hrg memo.	kh
7/2/73	Fld memo enin & ord that intervenor in case No. 72-607-R & defts in case No. 72-608-R, together with their respective exhibits, etc. are permtly enjoined from applying the provisions of Calif. Business & Professions Code secto 12211 & or provors of Title 4, Calif. Admin Code, Chapter 2, subchapter 7, Article 5, to articles prepared & marked by pltf under U.S. Dept of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act, etc. The crt retains jurisd. (Ent 7/4/73) JS-5 Fld cyps & mld prlys	
8/10/73	Fld defts note of mtn retnble 7/7/73, 9:30am to alter or amend court ord, mtn to alter or amend court ord and supporting memo.	kh
9/5/73	Filed Bill of Costs re: 72-608-R	
9/11/73	Costs in sum of \$28,322, payable to J. W. JONES	
7/2/73	Fld pltf's stmt of reasons and memo of pts and auth in appos to Jones mtn to alter or amend court ord, applic to modify inj.	kh

DATE	PROCEEDINGS	Date Order Judgment Made
5/1/73	Fld Deft's Request for Judicial Note.	an
5/4/73	Fld Deft's (Joseph W. Jones) Supplemental Memo in Support of Mtn to Alter or amend Crt ord & Affidavit of John Larose.	an
5/9/73	Fld Ord (R) That the Mtn of deft Joseph W. Jones entitled "Mtn to Alter or Amend Crt Ord" - is denied. Ent 5/9/73.	an
5/14/73	Fld deft Joseph W. Jones's NOTE OF APPEAL, (w/service thereon) and designation of record on appeal, cyps to (R) and to (RE).	kh
5/15/73	Fld Pltf's The Rath Packing Co. Note of Application & Application for Modification to Injunction retnble 6/4/73 at 10am.	an
5/16/73	Fld pltf's cost bond on appeal in the sum of \$250.00 No. 8635561.	kh
5/17/73	Mtn deft to alter or amend Crt's ord 4/4/73 denied.	McD
5/25/73	Fld pltf's NOTE OF APPEAL, (w/service thereon), cyps to (R) and to (RE). Fld pltf's costs bond on appeal in the sum of \$250.00.	kh
5/31/73	Fld Jones' opposition to Rath's application for modification of injunction. Fld Pltf's supplemental stmt of reasons & memo of pts & auths in support of application to modify injunction.	an
6/4/73	Hrg application for modification to injunction. Crt ords matter submitted (R).	McD
6/8/73	Fld deft not to extend time for transmitting records. LODGED proposed ord ext time to transmit record.	rif.
6-11-73	Fld ord (R) extending time to transmit record to 7-15-73	mr
6/15/73	Fld Ord (R) denying mtn for modification to the judgment of injunction.	an
7/20/73	Fld defts mtn to ext ti for transmitting record and ord (R) to and includg 8/12/73.	kh
9/7/73	Placed in file cost bond cost cross- appeal fld 5/25/73- Seaboard Surety Co. 8765420	
9/7/73	Placed in file bond for costs on appeal fld 5/16/73- Fidelity and Deposit Co. 88635561	
9/7/73	Placed in file cost bond on cross-appeal fld 5/25/73 - Seaboard Surety Co.	

BEST COPY AVAILABLE

I hereby certify that this is a true and correct copy of the original as filed in the court records of the County of Los Angeles, California.

77 10

77 10

I hereby certify that this is a true and correct copy of the original as filed in the court records of the County of Los Angeles, California.

Oct 25/77

LC No. #72-608

LC Judge Manual L. Real

Filed in D.C. 3/17/72

Notice of Appeal

Filed: 5/14/73

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

73- 2496

CIVIL DC, CENTRAL CALIFORNIA		CONSOLIDATED
RATH PACKING COMPANY		RELATED TO #73-2481 & 73-2482 &
Pltf.-Appellee		CROSS-APPEAL TO # 73-3180
vs.		73-3092 & 73-2496
PEOPLE OF THE STATE OF CALIF.		For Appellant:
Defendant		DEAN C. DUNLAVEY, Esq.
JOSEPH W. JONES,		For Appellant:
Deft.-Appellant		RAY T. SULLIVAN, Jr., County Counsel LOYAL E. KEIR, Dep. Cnty. Counsel

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
1973				
UG 17	Deposit, R. 12 R.T. Sullivan (41179)	25-	25-	
UG 17	Treasurer U.S.			25-
NOV 9	Deposit, R. Clerk J. R.T. Sullivan (42237)	15-	15-	
NOV 9	Treasurer U.S.			15-
<div style="border: 1px solid black; padding: 5px; width: fit-content;"> A TRUE COPY ATTEST APR 27 1976 EAM C by: <i>Winifred D. K. [Signature]</i> </div>				
To Repro.	NOV 6 1973	From Repro.	NOV 18 1973	

73- 2496

DATE		SAME RECORD FOR #73-3180 FILING PROCEEDINGS	CLERK'S FEES	
1973			APPELLANT	APPELLEE
Aug 10	FILED, 8/10/73, ORIG. & THREE COPIES OF APPELLANT'S MOTION FOR EXTENSION OF TIME TO TRANSMIT & FILE RECORD ON APPEAL FROM 8/12/73 to 9/28/73 TO (C). jjt		25.	
Aug. 10	DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.			
AUG 14	1973 FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to SEPTEMBER 28, 1973. Subject to reconsideration if any objection filed within 7 days. (fg)			
SEP 5	1973 Recvd. orig. & 3 applt's motion for ext of time to transmit & file the record on appeal to C. (rg)			
OCT 8	1973 FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973. (ff)			
ct 9	Recvd orig & 3 affidavit of ct. reporter in support of motion for ext of time to file record. bb			
OCT 9	1973 Recvd. in 73-2481 appellee's opposition to motions for ext of time to transmit & file the record on appeal to C. (rg)			
ct 12	Filed in 73-2481 order (C) re appellee's opposition: Previous order will stand, etc. bb			
CT 30	FILED CERT TRANSC OF RECORD ON APPEAL IN TWO VOLUMES: VOL I PLEADINGS ORIG ONLY; VOL II REPORTER'S TRANSC ORIG & 1 COPY PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED Brief times will be set when the cross appeal has been docketed -ra-			
NOV 12	FILED TWO ADDITL COPIES OF VOL I Clerk's fee		\$15	(s)
Nov. 16	APPELLANTS BRIEF DUE DECEMBER 26, 1973. jjt			
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-3092 & 73-3180 and motion for extension of time to file appellant's opening brief; to "C" cs			
DEC 6	1973 FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE."			
(SEE PAGE 2)				

DATE 1974	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
JAN 25 1974	FILED 25 APPELLANTS BRIEFS (RATH PACKING CO.) in 73-2481. ch		
FEB 7 1974	Filed orig. & 3 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) DENYING applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 1974	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 25 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
MAR 26 1974	FILED 25 APPELLANTS BRIEFS (for Joseph W. Jones) 3/25/74 qb		
Mar. 27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gh		
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2581 order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Filed, in 73-2481, order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 aplt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
SEE REVERSE SIDE			

DATE 1974	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
July 29	#73-3583 & #74-1051 for oral Filed aplt's (J. Jones) motion for consolidation of argument on appeal and to expedite oral argument to (C). jr		
July 31	Filed order (C) granting aplt (J. Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr		
Aug 2	Recvd Atty Genl.'s letter joining in motion for priority hearing. cs		
Aug 5	Filed aple & aplt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr		
Aug 13	Filed aplt's (Jones) response to Rath's opposition to motion for consolidation of appeals. cs		
Aug 13	Rec'd, in 73-3583, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr		
Aug 19	Filed order (C) my previous orders for consolidation will not apply to the General Mills case. jr		
Aug 19	Filed order (C) directing clerk to attempt a November, 1974 date. jr		
Aug 30 1974	Cause argued & submitted to Br, T, CJJ, Rich.		
Dec 23	Rec'd aplts additional citations to (panel). jr		
Dec 26	Rec'd Deputy Attorney General's letter in response to appellants additional citations to panel (sj)		
Dec 27	Rec'd (Rath Packing Co) letter dated Dec 23 re additional citations to panel (sj)		
Jan 3 1975	Rec'd Deputy Attorney General's letter of additional citations to (panel). jr		
March 12	Rec'd Aplt./Cross-Aple (Deputy Counsel) letter of add'tl citations. (to panel) -acb-		
Mar 19	Received Defendant's County Counsel letter of March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974. (passed to panel) sj		
SEE THIRD SHEET			

DATE 1973	SAME RECORD FOR #73-2496 FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	FILED OCT.30,1973 IN #73-2496, CERT TRANSC. OF RECORD ON APPEAL IN TWO VOLUMES: VOL. I, PLEADINGS, ORIG. ONLY: VOL. II, REPTA'S TRANSC., ORIG. & ONE COPY.		
Nov.15	DOCKET FEE PAID, CAUSE DOCKETED & ENTERED APPEARANCES OF COUNSEL.	50.	
Nov.16	APPELLANTS BRIEF DUE DECEMBER 26,1973. jjt Purs. to Rule 28 (c) & (h), FRAP Pltf. will be deemed the appellant for purposes of filing of briefs & will file the opening brief unless otherwise stipulated.		
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-3092, & 73-2496 and motion for extension of time to file appellant's opening brief; to "C" cs		
DEC 6	1973 FILED ORDER (C) in 73-2481 granting appellee's leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTION FILED MEANWHILE." (rg)		
JAN 25	1974 FILED 26 APPELLANTS BRIEFS (RATH PACKING CO. in 73-2481. th		
FEB 7	1974 Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 13	1974 FILED ORDER (C) in 73-2496 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file brief; to "C" cs		
FEB 21	1974 Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 23	1974 FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27	1974 FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar.26	Filed in 73-2496, 25 APPELLANTS BRIEFS. (for Joseph W. Jones) 3/25/74 gb		
Mar.27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb See Page 2.		

DATE	FILINGS-PROCEEDINGS	CLERK'S F	
		APPELLANT	APPELLEE
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-applt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). TY		
May 24	Filed, in 73-2481, order (T) granting cross applt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 applt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
July 29	Filed, in 73-2496, applt's (J.Jones) motion for consolidation of #73-2583 & #74-1051 for oral argument on appeal and to expedite oral argument to (C). jr		
July 31	Filed, in 73-2481, order (C) granting applt (J.Jones) priority in hearing date re oral argument. Subject to reconsideration if any objection filed within 7 days. Clerk will try for an October, 1974 date. jr		
Aug 2	Rec'd, in 73-2481, Atty General's letter joining in motion for priority hearing. cs		
Aug 5	Filed, in 73-2481, aple & applt's (Rath) opposition to motion to consolidate for argument, etc. to (C). jr		
Aug 13	Filed, 73-2481, applt's (Jones) response to Rath's opposition to motion for consolidation of appeals. cs		
Aug 13	Rec'd, in 73-3583, as of August 12, 1974, amicus curiae counsel's letter requesting that motion for consolidation be granted. (C) jr		
Aug 19	Filed, in 73-2496, order (C) my previous orders for consolidation will not apply to the General Mills case. jr		
Aug 19	Filed, in 73-2481, order (C) directing clerk to attempt a November, 1974 date. jr		
DEC 3	1974 Cause argued & submitted to Br. T. CJJ, Rich.		
	SEE REVERSE SIDE		

CALENDAR
12/1/74

73-3180

DATE	FILINGS PROCEEDINGS	CLERK'S FILES	
		APPELLANT	APPELLEE
1975			
March 17	Rec'd additional citations from Appt./Cross-Appl (Deputy County Counsel) (to panel) -acb-		
Mar 19	Received Defendant's County Counsel letter of March 17, 1975 supported with USDC of So. Dist of NY opinion dated Feb 25, 1974 (passed to panel) sj		
Oct. 29	ORDERED OPINION (RICH) FILED & JUDGE TO BE FILED & ENTD		
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct. 29	Filed & Entered Judgment. jr 55-34		
Nov 7	Filed in 73-2482, Bill of Cost (Rath Packing) ec		
JAN 14 1976	ISSUED JUDGMENT]		
Feb 4	Recvd. SC notice re: filing pet for cert 1/26/76 SC#75-1053		
Mar 2	Filed in 73-2481, Petitioners' emergency motion for recall of mandate. (p)		
Mar 10	Filed, in 73-2481, order (Br, T & Rich) the motion for recall of mandate is denied. jr		
Feb. 9	Received notice from Supreme Court that petition for certiorari has been filed. Assigned No. 75-1052. wdt		
Apr. 26	Filed certified copy of Supreme Court order granting certiorari on April 19, 1976. To panel. wdt		

Case No. #72-607
 D.C. Judge Manuel L. Real
 Filed in D.C. 3/17/72
 Notice of Appeal
 Dated: 5/4/73

UNITED STATES COURT OF APPEALS
 FOR THE NINTH DISTRICT

73-2481

CIVIL, DC, CENTRAL CALIFORNIA	CONSOLIDATED
	COMPARISON TO #73-2482 - RELATED TO #73-2496 & CROSS-Appel to #73-3092 & 73-3180
RATH PACKING COMPANY,	For Appellant:
Pltf.-Appellee	DEAN C. DUNLAVEY, Esq.
vs.	
M. H. BECKER,	For Appellant:
Def.-Appellant	JOHN LARSON, Esq. Cnty. Counsel
C. B. CHRISTENSEN	ARNOLD K. GRAHAM, Esq., Dep. Cnty Counsel
Intervenor	

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
17	Deposit, R. 12 (4/2/76) (41121)	25-	25-	
	Treasurer U.S.			25-
2	Deposit, R. Check 2 (4/2/76) (42196)	15-	15-	
	Treasurer U.S.			15-
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>A TRUE COPY ATTEST MAY 10 1976 EMIL E. MELFI, JR. Clerk of Court by: Winifred D. Taylor Winifred D. Taylor Chief Deputy Clerk</p> </div>				
NOV 5 1973	From Repro.	NOV 8 1973		

73-2481

DATE 1973	SAME RECORD FOR #73-2481 & 73-2482 FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	8/3/73 FILED, MOT. & ORDER (C) TO EXTEND APPELLANT'S TIME TO TRANSMIT AND FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 TO 9/28/73. DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. jje	25.	
Aug. 8			
OCT 4 '73	Recvd. orig. & 3 applt/intervenor motion for further ext of time to file the record to C. (ff)		
OCT 8 '73	FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973...for 73-2481 & 73-2482. (ff)		
OCT 8 '73	Recvd. orig. & 8 appellee's motion in opposition to motions for ext of time to transmit the record on appeal to C. (rg)		
OCT 12	Filed order (C) re appellee's opposition: Previous order will stand, etc. bb		
OCT 23	FILED CERT TRANSC OF RECORD ON APPEAL IN SEVEN VOLUMES: VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANSC ORIG & 1 COPY. FILED ORIG EXHIBITS IN ROOM 219***** -ra-		
	PURSUANT TO RULE 29(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed -ra-		
OCT 31	Appellant's Brief Due December 10, 1973 -ra-		
OCT 31	Recvd letter from Atty General's office re: motion for extension of time to file record. ty		
NOV 8	FILED TWO ADDITL COPIES OF VOLS 1 - 4 Clerk's fee \$15 (s)		
NOV 28	Filed orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2482, 73-3092, 73-2496 & 73-3180 and extension of time to file appellant's opening brief; to "C" cs		
DEC 1 '73	FILED ORDER (C) granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2482, 73-3092, 73-2496 & 73-3180, and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
1974	FILED 25 APPELLEES' REPLY BRIEFS (RATH PACKING CO.) th		
	(SEE PAGE 2)		

73-2481

(page 2)

DATE 1974	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
FEB 7 '74	Filed in 73-2496 applt's /cross appellee's motion for ext of time to file reply brief to C. (rg)		
FEB 11 '74	FILED ORDER (C) in 73-2497 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed orig & 3 aples' (Beckler & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 '74	Filed orig. & 3 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 26 '74	FILED ORDER (C) EXTENDING TIME TO FILE appellees' (BECKLER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 '74	FILED ORDER (C) EXTENDING TIME TO FILE applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar. 27	Filed 25 APPELLEES/CROSS-APPELLANTS (Beckler & Christensen) BRIEFS.		
Apr 15	Filed motion for ext of time to file cross (3/27/74) ch Aplt's reply brief (RATH) (C) (sp)		
Apr 19	Filed order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Rec'd. 25 Reply Briefs for Aplt. (Rath Packing Co.). -cr-		
May 24	Filed order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
MAY 24 1974	FILED 25 APPELLANTS REPLY BRIEFS (5/21/74) ja		
July 26	Filed aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
DEC 5 1974	Cause argued & submitted to BY, T. COJ, RICH. FOR FURTHER PROCEEDINGS SEE #73-2496		
1975			
Oct. 29	ORDERED OPINION (RICH) FILED & JUDGE TO BE FILED & ENTD		
Oct. 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct. 29	Filed & Entered Judgment. jr 65-39		
JAN 14 1976	ISSUED JUDGMENT		

CALENDARED
10-10-75

[illegible]

DATE	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
17	Deposit, R. 12 Treasurer H of Co. (41172)	25 -	25 -	
17	Treasurer U.S.	0		25 -

A TRUE COPY
 ATTEST MAY 10 1973
 EMIL E. NIELS
 Clerk of Court
 By: Winifred D. Taylor
 Winifred D. Taylor
 Chief Deputy Clerk

NOV 5 1973

NOV 6 1973

BEST COPY AVAILABLE

73-2482

DATE 1973	SAME RECORD FOR #73-2481 & 73-2482 FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	FILED 8/8/73 IN #73-2481, MOT. & ORDER (C) TO EXTEND APPELLANTS TIME TO TRANSMIT & FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 TO 9/28/73. jjt		
Aug 8	DOCKET FEE PAID. DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. jjt	25.	
OCT 4	73 Recvd in 73-2481 applt/intervenor motion for ext of time to C. (ff)		
OCT 8	FILED MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973 filed in 73-2481. (ff)		
OCT 9	1973 Recvd. in 73-2481 appellee's opposition to motion for ext of time to transmit & file the record on appeal to C. (rg)		
Oct 12	Filed in 73-2481 order (C) re appellee's opposition: Previous order will stand, etc. bb		
OCT 23	FILED IN 73-2481 CERT TRANS OF RECORD ON APPEAL IN SEVEN VOLUMES: VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANS ORIG & 1 COPY. FILED ORIG EXHIBITS IN ROOM 219***** -ra-		
	PURSUANT TO RULE 28(e) & (h) P.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed -ra-		
OCT 31	Appellant's Brief Due December 10, 1973 -ra-		
Oct 31	Recvd letter from office of Atty Gen. re: motion for extension of time to file record. ty		
NOV 8	FILED IN # 73-2481, TWO ADDITL COPIES OF VOLS 1 - 4 (s)		
Nov 26	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-3092, 73-2496 & 73-3180 and motion for extension of time to file appellant's opening brief; to "C" cs		
	FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) leave to consolidate appeal with 73-2481, 73-2482, 73-3092, 73-2496 & 73-3180 and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
	(SEE PAGE 2)		

73-2482

(PAGE 2)

DATE 1974	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
JAN 25 1974	FILED 25 APPELLANTS BRIEF (RATH PACKING CO.) in 73-2481. th		
FEB 7 1974	Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) denying motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
FEB 21 1974	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
FEB 26 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file applt's (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar 27	Filed in 73-2481, 25 APPELLEES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb		
Apr 15	Filed in 73-2481 motion for ext of time to file cross Applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-applt/aple (Rath) to file reply brief to May 25, 1974 subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T) . ty		
May 24	Filed, in 73-2481, order (T) granting cross applt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 applt's reply briefs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
	Cause argued & submitted to Br, T, CJJ, Rich. CALENDARED 12/15/74		
	FOR FURTHER PROCEEDINGS SEE #73-2496		
	SEE REVERSE SIDE		

DATE		FILINGS PROCEEDINGS	CLERK'S FEES	
			APPELLANT	APPELLEE
1975				
Oct 29	ORDERED OPINION (Rich) FILED & JUDG TO BE FILED & ENTD			
Oct 29	Filed opinion - Affirmed in part, reversed in part & remanded			
Oct 29	Filed & Entered Judgment. jr 55-34			
Nov 7	Filed Bill of Cost (Rath Packing) ec (panel)			
JAN 14 1976	ISSUED JUDGMENT			
Feb. 4	Recvd. S.C. notice re: filing pet for cert 1/26/76 SC#75-1053			
Mar 2	Filed in 73-2481, Petitioners emergency motion for recall of mandate. (panel)			
Mar 12	Filed order (Br, T & Rich) the motion for recall of mandate is denied. jr			
Mar 17	Filed Opposition (Rath Packing) to "EMERGENCY MOTION" for recall of mandate, etc. ec			

[illegible]

73-3092

*****SECOND PAGE OF 73-3092*****

DATE	FILINGS PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPELLEE
	SAME RECORD FOR 73-2481 & 73-2482		
	FILED 8/8/73 MOT & ORDER (C) TO EXTEND APPELLANT'S TIME TO TRANSMIT AND FILE THE RECORD & DOCKET APPEAL FROM 8/2/73 to 9/28/73		
	FILED 10/8/73 MOTION AND ORDER (C) EXTENDING TIME TO file the record on appeal to OCTOBER 31, 1973...for 73-2481 & 73-2482 FILED OCT 23, 1973 IN 73-2481 CERT TRANSC OF RECORD ON APPEAL IN SEVEN VOLUMES, VOL I THRU IV PLEADINGS ORIG ONLY; VOL V THRU VII REPORTER'S TRANSC ORIG & 1 COPY. FILED ORIG EXHIBITS IN 219*****		
OCT 31	DOCKET FEE PAID-- DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL PURSUANT TO RULE 28(c) & (h) F.R.A.P. PLAINTIFF WILL BE DEEMED THE APPELLANT FOR PURPOSES OF FILING BRIEFS AND WILL FILE THE FIRST BRIEF UNLESS OTHERWISE STIPULATED. Brief times will be set when the cross appeal has been docketed	\$25	
OCT 31	Appellant's Brief Due December 10, 1973 -ra-		
NOV 8	FILED IN # 73-2481, TWO ADDITL COPIES OF VOLS 1 - 4 (s)		
Nov 28	Filed in 73-2481, orig & 3 copies appellee/cross-appellant's (Rath) motion to consolidate appeal with 73-2481, 73-2482, 73-2496 & 73-3092 and motion for extension of time to file appellant's opening brief; to "C" cs		
DEC 6 1973	FILED ORDER (C) in 73-2481 granting appellee's/cross applt's (RATH) lea to consolidate appeal with 73-2481, 73-2482, 73-3092 & 73-2496 & 73-3180 and the ext of time to file brief to JANUARY 28, 1974. "EFFECTIVE 7 DAYS FROM DATE IF NO OBJECTIONS FILED MEANWHILE." (rg)		
JAN 21	FILED IN 73-2481, APPELLANT'S BRIEF (RATH PACKING CO.) in 73-2481. th		
FEB 7	Filed in 73-2496 applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file reply brief to C. (rg)		
FEB 11 1974	FILED ORDER (C) in 73-2496 denying applt's/cross appellee's (JOSEPH W. JONES) motion for ext of time to file brief. "IN REAPPLYING COUNSEL SHOULD STATE ATTITUDE OF OPPONENT." (rg)		
Feb 19	Filed, in 73-2481, orig & 3 aples' (Becker & Christensen) motion for ext of time to file briefs; to "C" cs		
	Filed in 73-2481 applt's (JOSEPH W. JONES) motion for ext of time to file brief to C. (rg)		
	*****SEE SECOND PAGE*****		

DATE	FILINGS PROCEEDINGS	CLERK'S F	
		APPELLANT	APPELLEE
1974			
Feb 1 1974	FILED ORDER (C) in 73-2481 extending time to file appellees' (BECKER & CHRISTENSEN) brief to MARCH 26, 1974. Subject to reconsideration if any objections filed within 7 days. (rg)		
FEB 27 1974	FILED ORDER (C) in 73-2481 extending time to file (JOSEPH JONES) brief to MARCH 26, 1974. (rg)		
Mar. 27	Filed in 73-2481, 25 APPELLES/CROSS-APPELLANTS (Becker & Christensen) BRIEFS. (3/26/74) gb		
Apr 15	Filed in 73-2481 motion for ext of time to file cross applt's reply brief (RATH) (C) cl		
Apr 19	Filed in 73-2481 order (C) granting ext for cross-aplt/aple (Rath) to file reply brief to May 25, 1974, subject to reconsideration if any objection filed within 7 days. cl		
May 20	Filed in 73-2481 aple/cross-applt (Rath) motion for leave to file oversize brief (T). ty		
May 24	Filed, in 73-2481, order (T) granting cross aplt/aple (Rath) permission to file a reply brief in excess of 25 pages. jr		
May 24	Filed, in 73-2481, 25 aplt's reply breifs. (5/23/74) gb		
July 26	Filed, in 73-2481, aple/cross applt's (Rath) motion for priority in hearing date re oral argument to (C). jr		
AUG 5 1974	Case argued & submitted to Br. T, CJS, Rich. FOR FURTHER PROCEEDINGS SEE #73-2496		
1975			
Oct 29	ORDERED OPINION (RICH) FILED & JUDG TO BE FILED & ENTD		
Oct 29	Filed opinion - Affirmed in part, reversed in part & remanded		
Oct 29	Filed & Entered Judgment. jr 65-34		
Nov 7	Filed in 73-2482, Bill of Cost (Rath Packing) ec		
JAN 14 1975	ISSUED JUDGMENT		
Feb. 4	Recvd. SC notice re: filing pet for cert 1/26/76 SC#75-1053		
Mar 2	Filed in 73-2481, Petitioners' emergency motion for recall of mandate. (panel) ec		
Mar 12	Filed, in 73-2481, order (Br, T & Rich) the motion for recall of mandate is denied. jr		

Joseph W. Jones v. The Rath Packing Co.

Complaint for Declaratory Relief and Injunction.

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. The People of the State of California; Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civil Action No. 72-608-LTL.

As and for its complaint herein, plaintiff The Rath Packing Company alleges as follows:

1. Plaintiff The Rath Packing Company ("Rath") is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in Waterloo, Iowa.

2. Defendant Joseph W. Jones ("Jones") is Director of the County of Riverside Department of Weights and Measures and is a California citizen.

3. This action is instituted and arises under 21 U.S.C. § 601, *et seq.* (the Federal Wholesome Meat Act of 1967). Furthermore, this action is between citizens of different states. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. Jurisdiction of this Court is based on 28 U.S.C. §§ 1331(a) and 1332(a) and on 21 U.S.C. § 674; venue is based on 28 U.S.C. § 1391. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto, pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court.

4. Rath is a manufacturer of meat food products as defined in 21 U.S.C. § 601(j), is engaged in inter-

state commerce, is registered with the Secretary of Agriculture of the United States as required by 21 U.S.C. § 601, *et seq.*, and is inspected at all times by the United States Department of Agriculture.

5. The labeling of all bacon and other meat food products packaged and sold by Rath, including without limitation an accurate statement of the quantity of the contents thereof in terms of weight, is performed by Rath in accordance with the regulations and requirements of the United States Department of Agriculture—i.e., under 21 U.S.C. §§ 601(n)(1) and (5), 607; under Title 9, Code of Federal Regulations, Part 317; and under the Manual of Meat Inspection Procedures of the United States Department of Agriculture.

6. Pursuant to the foregoing regulations and requirements, Rath is required to mark on the label of each meat food product package an accurate statement of the quantity of contents of such meat food product package in terms of weight, exclusive of wrappers and packing substances, at the time such meat food product package leaves Rath's plant. At all times mentioned in this complaint, Rath has complied fully with said regulations and requirements.

7. 21 U.S.C. § 678 provides that marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the Federal Wholesome Meat Act of 1967 may not be imposed by the State of California with respect to articles prepared by Rath under United States Department of Agriculture inspection in accordance with said Act. All meat food products packaged by Rath at issue herein have been and are prepared by Rath under such inspection in accordance with said Act.

8. Each defendant now contends to have the right to impose, and has imposed and is imposing, requirements upon the marking, labeling and packaging of such packages of meat food products prepared by Rath which are in addition to, and different from, the requirements of the United States Department of Agriculture. In particular, The People of the State of California contend that certain California statutes (*viz.* Health and Safety Code § 26550; Business and Professions Code § 17500; Civil Code § 3369) impose requirements upon the marking, labeling and packaging of such meat food products prepared by Rath; that said statutes are being violated by Rath; and that any district attorney in this state may maintain actions based thereon against Rath in superior courts of this state. In further particular, defendant Jones now contends to have the right to impose, and has imposed and is imposing, a requirement that the statement on each such package of meat food product of the quantity of contents of such meat food product package in terms of weight be accurate at a time after such meat food product leaves Rath's plant; namely, in the possession of dealers. Neither defendant recognizes reasonable variation from the stated quantity of contents caused by loss of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice, each of which is specifically recognized and allowed by the United States Department of Agriculture under 21 U.S.C. § 601(n)(5) and Title 9, C.F.R. § 317.2(h)(2).

9. Rath denies each contention of each defendant as set forth in Paragraph 8; contends that neither defendant may impose marking, labeling, packaging, or ingredient requirements with respect to such packages

of meat food products in addition to, or different than, those made under the Federal Wholesome Meat Act of 1967; and contends that neither defendant has the right to impose the requirement with respect to such packages of meat food products that the statement on any such package of meat food product of the quantity of contents of such meat food product package in terms of weight be accurate at a time after such meat food product leaves Rath's plant; namely, in the possession of dealers.

10. An actual controversy now exists between each defendant and Rath with respect to the legal relations of the parties and the rights of Rath under the Federal Wholesome Meat Act of 1967. The value to Rath of its right to be free of the aforesaid requirements by each defendant in addition to, and different from, said Act exceeds the sum of \$10,000, exclusive of interest and costs.

SECOND CAUSE OF ACTION

11. Rath incorporates herein, with the same force and effect as if set forth in full, the allegations of Paragraphs 1 through 10, inclusive.

12. Pursuant solely to defendant Jones' aforesaid contentions and requirements, and by acting through his deputies and inspectors, defendant Jones has ordered and is ordering "off sale" meat food products prepared, packaged, labeled, and sold by Rath under United States Department of Agriculture inspection in accordance with the Federal Wholesome Meat Act of 1967, and otherwise has prevented and is preventing the sale by Rath and by dealers of such meat food products. In so doing, defendant Jones is acting unlawfully and beyond the scope of his authority, is applying

California law to conduct not within its terms, and is violating the Federal Wholesome Meat Act of 1967.

13. By his said unlawful acts, defendant Jones has caused Rath monetary damages grossly in excess of \$10,000, as well as irreparable injury to its reputation among dealers and the consuming public. Defendant Jones is continuing and threatening to continue his said acts, and will cause Rath further monetary damages and further immediate and irreparable injury, unless and until restrained by this Court. Pecuniary compensation to Rath will not afford adequate relief for such acts.

WHEREFORE, Rath prays judgment as hereinafter set forth:

1. For a declaration that the legal relations of the parties and the rights of Rath are in accordance with the contentions of Rath as set forth in Paragraph 9 above;

2. That defendant Jones, and his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him, be restrained and enjoined both pending the trial of this action and thereafter:

(a) from imposing marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to articles prepared by Rath under United States Department of Agriculture inspection in accordance with the requirements under said Act; and

(b) from ordering "off sale", or otherwise preventing the sale of, any package of meat food products prepared by Rath under United States

Department of Agriculture inspection in accordance with the Wholesome Meat Act of 1967 on grounds that the statement on such package of meat food product of the quantity of contents of such meat food product package in terms of weight is not accurate at a time after such meat food product has left Rath's plant;

3. For costs of suit incurred by Rath; and
4. For such other and further relief which the Court may deem just and proper.

GIBSON, DUNN & CRUTCHER
SHERMAN WELPTON, JR.
DEAN C. DUNLAVEY

/s/ By Dean C. Dunlavey
Dean C. Dunlavey
Attorneys for Plaintiff
The Rath Packing Company

VERIFICATION

State of California, County of Los Angeles—ss:

MORRIS Y. KINNE, being first duly sworn according to law, verifies and says:

I am Secretary of The Rath Packing Company; the attached Complaint is true of my own knowledge.

/s/ Morris Y. Kinne
Morris Y. Kinne

Subscribed and sworn to before me this 17th day of March, 1972.

/s/ Maria T. Sequeira
Notary Public

[Seal]

Answer to Complaint.*

United States District Court, Central District of California.

The Rath Packing Company, a Corporation, Plaintiff, vs. The People of the State of California; Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civil Action. No. 72-608-R.

Defendant JONES, for his answer to the Complaint herein, alleges as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Denies upon information and belief each and every allegation contained in Paragraph 3, and therefore denies, upon information and belief, that this court has any jurisdiction.
- By reason of the aforesaid denial, defendant denies that plaintiffs are legally entitled to seek either a declaration of their rights or an injunction of defendant, or any other relief sought in the Complaint.
4. Admits that Rath is a manufacturer of meat food products and that it is registered with the Secretary of Agriculture of the United States, but denies upon information and belief each and every other allegation in Paragraph 4.

5. Denies upon information and belief each and every allegation in Paragraph 5.

6. Admits that the contents of a meat food product package are required by Federal regulations to be labeled with a statement of the quantity of contents, but

* Certificate of service by mail is omitted.

defendant denies upon information and belief that said labeling regulations are applicable only to the time such meat food product package leaves the manufacturing plant. Defendant further denies upon information and belief that plaintiff has fully complied with said regulations as alleged in Paragraph 6 of the Complaint.

7. Denies upon information and belief each and every allegation set forth in Paragraph 7.

8. Admits that certain California statutes impose labeling requirements for packaged food products, and further admits that defendant has enforced California statutory requirements that meat food product packages be generally accurate in terms of weight at the consumer level, but otherwise denies the allegations of Paragraph 8.

9. Denies each and every allegation stated in Paragraph 9.

10. Denies on information and belief each and every allegation stated in Paragraph 10.

SECOND CAUSE OF ACTION

11. Defendant incorporates herein, with reference to Paragraph 11 of the Complaint, with the same force and effect as if set forth in full, its answers above in Paragraphs 1 through 10, inclusive.

12. Admits that Defendant JONES has ordered off sale packages of bacon packed by Rath when such packages were misbranded as to weight and were outside the establishment, but otherwise denies the allegations of Paragraph 12.

13. Denies each and every allegation stated in Paragraph 13 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

14. The Complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

15. On or about February 17, 1972, Rath was named as a defendant in a suit brought against it by the People of the State of California in the Superior Court of the State of California for the County of Riverside, case number 101876. Pursuant thereto, plaintiff filed a cross-complaint against defendant herein on or about March 30, 1972. The cross-complaint was for declaratory relief and injunction, based upon the same claim for relief as that set forth in the Complaint herein. The parties to such action and to this proceeding are identical.

On May 6, 1972, the Superior Court for the County of Riverside, after an extensive hearing, granted the application of the People of the State of California for a preliminary injunction, and denied Rath's application for a preliminary injunction against this defendant.

On August 8, 1972, this defendant filed a Motion for Summary Judgment against Rath in the State court proceeding. A hearing on the Motion was held on September 12, 1972. On November 14, 1972, the Superior Court entered the following order:

(a) That the enforcement of the California law and regulations in ordering off sale packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, does not constitute the imposition of marking, labeling, packaging or ingredient requirements in addi-

tion to, or different than, those imposed under the Federal Act.

(b) That the enforcement of the California law and regulations in ordering off sale the packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, is not preempted by the Federal Act.

(c) That the Cross-Complaint against Cross-Defendant Jones to enjoin him from ordering off sale packaged meat food products packed in a Federally inspected establishment when such packaged meat food products are misbranded as to weight and are outside the establishment, be denied.

On November 14, 1972, the Superior Court entered Summary Judgment in favor of Jones and against Rath. On November 15, 1972, the Clerk of the Superior Court served notice to all parties of the Entry of Summary Judgment.

THIRD AFFIRMATIVE DEFENSE

16. In doing the acts complained of in both the first and second causes of action of the Complaint, defendant was duly authorized by and acted under the authority of Division V, Chapter 1, of the California Business and Professions Code (commencing with Section 12001 *et seq.*), and 4 California Administrative Code, Chapter 8, subchapter 2, article 5 (§§ 2930 *et seq.*). Defendant further acted in accordance with the requirements of the Federal Wholesome Meat Act of December 15, 1967, Pub. L. 90-201, 81 Stat. 587 (21 U.S.C. 601 *et seq.*).

Defendant's said actions constitute a reasonable exercise of the police power of the State of California to protect the general health and welfare of its citizens.

WHEREFORE, defendant prays for judgment as follows:

1. That plaintiff's Complaint be dismissed and that no relief be granted to plaintiff thereunder;
2. For costs of suit incurred herein by defendant; and
3. For such other and further relief which the Court may deem just and proper.

Dated: December, 1972.

RAY T. SULLIVAN, JR.,
County Counsel
by /s/ Loyal E. Keir
Loyal E. Keir,
Deputy County Counsel
Attorneys for Joseph W. Jones,
Director of Department of
Weights and Measures.

Affidavit of Morris Y. Kinne.

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendant. Civil Action No. 72-608-R.

State of California, County of Los Angeles—ss:

MORRIS Y. KINNE, being first duly sworn according to law, deposes and says:

I am a resident of Waterloo, Iowa and the Secretary of The Rath Packing Company ("Rath"), a corporation organized and existing under the laws of the State of Iowa with its principal place of business located at Waterloo, Iowa. Rath is engaged in interstate commerce and operates a number of meat food products manufacturing plants throughout the United States, including a plant located in the City of Vernon, County of Los Angeles, State of California.

Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, acting through deputies and inspectors of the County of Riverside Department of Weights and Measures, is ordering "off sale" packages of bacon and other meat food products (wieners, luncheon meats, etc.) prepared and sold by Rath and in the hands of dealers on the grounds that the statement on the package of such meat food product of the quantity of contents of such meat food product package in terms of weight is not accurate at the time of possession by the dealer. An example of the off-sale orders and tags used is Exhibit A hereto.

The threat of further such "off sale" orders by the Riverside County Department of Weights and Measures has caused and is causing Rath to overpack approximately six thousand pounds of meat food products in its packages each week, since each article prepared at the Vernon plant potentially may be distributed in Riverside County.

Said acts daily are causing Rath great, immediate and irreparable injury, loss and damage to its reputation and good will with its customers and the ultimate consumer for which pecuniary compensation affords no adequate relief, in addition to monetary damages substantially in excess of \$10,000 but whose exact amount will be extremely difficult or impossible to ascertain.

Each Rath plant is registered with the United States Department of Agriculture and is inspected at all times by authorized representatives of the Secretary of Agriculture of the United States as required by 21 U.S.C. § 601, *et seq.* Each Rath plant generally is designated as Official Establishment No. 186 (sometimes with a suffix serial letter). All meat food products packaged by Rath have been and are prepared, packaged and labeled by Rath under inspection by the United States Department of Agriculture in accordance with the federal Wholesome Meat Act of 1967.

The labeling of all bacon and other meat food products packaged and sold by Rath at its Vernon Plant and at each other Rath plant, including without limitation an accurate statement of the quantity of

the contents thereof in terms of net weight, is performed by Rath in accordance with the regulations of the United States Department of Agriculture, i.e., under 21 U.S.C. §§ 601(n)(1) and 5, 607; under Title 9, Code of Federal Regulations, Part 317; and under the Manual of Meat Inspection Procedures of the United States Department of Agriculture.

Pursuant to the foregoing regulations and requirements, Rath is required to mark, and does mark, on the label of each meat food product package an accurate statement of the quantity of contents of such meat food product package in terms of weight, exclusive of wrappers and packing substances, at the time such meat food product package leaves Rath's plant.

Each package of bacon and other meat food product which is prepared, labeled and sold by Rath, including but not limited to each package of bacon and other meat food product which has been ordered "off sale" as aforesaid, has been prepared by Rath under inspection by the United States Department of Agriculture in accordance with the federal Wholesome Meat Act of 1967.

These meat food products lose some moisture during the course of good distribution practices. In a non-hermetically sealed package, the moisture is lost to the atmosphere and/or by absorption into the packaging material; in a hermetically sealed package, the moisture is lost by condensation onto and/or by absorption into the packaging material. Either way, Jones does not recognize the loss. This, together with some

unavoidable deviation in good manufacturing practices as recognized by the United States Department of Agriculture, is the reason why the Riverside County Department of Weights and Measures can find some packages of meat food products in the hands of dealers whose net contents will weigh several sixteenths of an ounce per pound below the net weight stated on the label. The net contents of some packages of meat food products in the hands of dealers also will weigh several sixteenths of an ounce per pound over the net weight stated on the label because of unavoidable deviation in good manufacturing practices.

/s/ Morris Y. Kinne
Morris Y. Kinne

Subscribed and sworn to before me this 26th day
of March, 1973.

/s/ Arlene Goldberg
Notary Public

[Seal]

Amended Order.

United States District Court, Central District of
California.

The Rath Packing Company, a corporation, Plaintiff,
v. M. H. Becker as Director of the County of Los
Angeles Department of Weights and Measures, De-
fendant. C. B. Christensen as Director of Agriculture
of the State of California, Intervenor. Civil Action No.
72-607-R.

The Rath Packing Company, a corporation, Plaintiff,
v. Joseph W. Jones as Director of the County of
Riverside Department of Weights and Measures, De-
fendant. Civil Action No 72-608-R.

Pursuant to the Opinion of the United States Court
of Appeals for the Ninth Circuit in cases Nos. 73-
2481, 73-2482, 73-3092, 73-2496 and 73-3180, entered
October 29, 1975, the order of this District Court
in cases Nos. 72-607-R and 72-608-R hereby is amended
to read as follows:

IT IS ORDERED:

(1) that this Court has jurisdiction over the
subject matter of this case, personal jurisdiction
being conceded;

(2) that Title 9 Code of Federal Regulations
§ 317.2(h)(2) is valid;

(3) that the Wholesome Meat Act of 1967,
21 U.S.C. § 601 et seq., and 9 C.F.R. § 317.2(h)
(2) preempt Cal. Bus. and Prof. Code § 12211
and 4 Cal. Admin. Code, ch. 8, subch. 2, Art.
5, and each of them, as to meat and meat food
products prepared under United States Department
of Agriculture inspection;

(4) that the Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq., and 9 C.F.R. § 317.2(h) (2) preempt Cal. Bus. and Prof. Code § 12607 (to the extent that § 12607 is interpreted to permit a definition of "net quantity" which does not recognize the reasonable variations allowed by the federal standard or which otherwise is "in addition to or different than" the federal net weight labeling requirements) and 4 Cal. Admin. Code, ch. 8, subch. 2, Art. 5.1, and each of them;

(5) that defendant and intervenor in case No. 72-607-R, and defendant in case No. 72-608-R, together with their respective successors, deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with any defendant or intervenor, and each of them, are restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211 and/or section 12607 (to the extent § 12607 is preempted), and/or the provisions of Title 4, Cal. Admin. Code, ch. 8, subch. 2, Art. 5 and/or Art. 5.1, to articles prepared and marketed by plaintiff under United States Department of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act of 1967;

(6) that state standards not in addition to or different than the federal net weight labeling standard may be enforced by appropriate State procedures at the wholesale and retail levels; and

(7) the Court reserves the continuing jurisdiction to make any modification to the injunction

contained herein, upon proper application by any party and consonant with the Opinion of the Court of Appeals, as the ends of justice may require.

DATED: May 13, 1976.

MANUEL L. REAL
United States District Judge

Approved as to form:

John Larson, County Counsel,
Los Angeles County

Arnold K. Graham, Deputy County Counsel
/s/ By: Arnold K. Graham
Attorneys for M. H. Becker

Ray T. Sullivan, Jr., County Counsel,
Riverside County

Loyal E. Keir, Deputy County Counsel
/s/ By: Loyal E. Keir
Attorneys for Joseph W. Jones

Evelle J. Younger, Attorney General

Allan J. Goodman, Deputy Attorney General
/s/ By: Allan J. Goodman
Attorneys for L. T. Wallace
(successor to C. B. Christensen)

Order of the United States District Court, dated April 3, 1973, is in the Appendix to the Petition, page 68.

L. T. Wallace v. The Rath Packing Co.

Pre-Trial Conference Order.

United States District Court, Central District of California.

The Rath Packing Company, a corporation, Plaintiff, vs. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, Defendant. C. B. Christensen as Director of Agriculture of the State of California, Intervenor. Civil Action No. 72-607-R.

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

IT IS ORDERED:

I

A. This is an action by plaintiff The Rath Packing Company for declaratory and injunctive relief arising out of a dispute as to the application of the federal Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*); California Business and Professions Code §§ 12024, 12024.5 and 12211; and regulations promulgated under each of the foregoing.

This action is against defendant M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures and intervenor C. B. Christensen as Director of Agriculture of the State of California.

The pleadings raising the issues of this action are plaintiff's Complaint, the Answer by defendant Becker, and the Answer by intervenor Christensen.

B. This action also includes a counterclaim by intervenor C. B. Christensen for declaratory and injunctive relief arising out of the same dispute, alleging that the federal Wholesome Meat Act of 1967 requires accurate weight at retail.

This counterclaim is against plaintiff The Rath Packing Company.

The pleadings raising the issues in this action are intervenor's Counterclaim and Rath's Reply to that Counterclaim.

II

Federal jurisdiction and venue are invoked upon the following grounds:

1. General federal question jurisdiction (28 U.S.C. § 1331). This action arises under the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*). The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.

2. Diversity jurisdiction (28 U.S.C. § 1332). Plaintiff The Rath Packing Company is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in Waterloo, Iowa. Defendant Becker and intervenor Christensen are California citizens. This action is between citizens of different states. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.

3. Specific federal question jurisdiction (21 U.S.C. § 674). This action arises under the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) and seeks to enforce the provisions of that Act and to restrain and prevent violations thereof.

4. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto pursuant to 28 U.S.C. §§ 2201 and 2202 in respect to an actual controversy between them which is within the jurisdiction of this Court.

III

The following facts are admitted and require no proof:

1. Plaintiff and Counterdefendant The Rath Packing Company (hereinafter referred to as "Rath") is a corporation organized and existing under the laws of the State of Iowa and has its principal place of business in Waterloo, Iowa.

2. Defendant M. H. Becker (hereinafter referred to as "Becker") is Director of the County of Los Angeles Department of Weights and Measures and is a California citizen.

3. Intervenor and Counterclaimant C. B. Christensen (hereinafter referred to as "Christensen") is Director of Agriculture of the State of California and is a California citizen. Christensen, as Director of Agriculture of the State of California, is the officer of the State of California charged with (a) enforcement of California weights and measures statutes (contained in Division V of the California Business and Professions Code), (b) supervision of enforcement of said statutes by county sealers (Directors of Weights and Measures) including without limitation Becker, and (c) promulgation, enforcement and supervision of enforcement of regulations adopted pursuant to the authority granted to the Director in said Division V.

4. This action arises under the federal Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*). This

action is between citizens of different states. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1332 and 21 U.S.C. § 674. This is also a civil action for a judgment declaring the rights and other legal relations of the parties hereto pursuant to 28 U.S.C. §§ 2201 and 2202, in respect to an actual controversy between them which is within the jurisdiction of this Court. Venue is based upon 28 U.S.C. § 1391.

5. Rath is engaged in interstate commerce and is subject to the provisions of the Wholesome Meat Act of 1967 (21 U.S.C. §§ 601 *et seq.*). Each Rath establishment preparing meat food products has been granted an official inspection number by the United States Department of Agriculture under Title 9, C.F.R. § 305.1(a).

6. Among its activities, Rath packages bacon in containers with the purpose and expectation that, after filling, such containers will be sold to consumers. Prior to filling each container with bacon, Rath causes each container to be printed with, among other things, the following information;

(a) a statement of the quantity of contents of the container (when filled) in terms of weight, exclusive of wrappers and packing substances; and

(b) the Rath name or other trade names or markings.

7. With the knowledge and approval of Rath, the described containers of bacon packaged by Rath have been sold to consumers through retail outlets in Los Angeles and other California counties since at least April 1, 1971. The bacon so packed is sold for human food purposes.

8. During the period April 1, 1971 through March 23, 1972, Los Angeles County Weights and Measures officials inspected packages of Rath bacon when displayed and offered for retail sale to consumers in said county and, allegedly pursuant to the standards of California Business and Professions Code § 12211 and 4 California Administrative Code §§ 2930 *et seq.* and during the period September 1971 through March 1972, ordered "off sale" approximately eighty-four (84) lots of bacon packaged by Rath.

9. Rath knew or was informed of many of these "off sale" orders.

10. During the period April 1, 1971 through March 1, 1972, Weights and Measures officials of other California counties similarly have ordered "off sale" some packages of bacon prepared by Rath.

* * *

VI

At the instance of Becker and Christensen, Rath agrees that the factual issues of this action may be limited to those concerning the meat food product *bacon* as that product was or is processed, packaged and sold within the County of Los Angeles, State of California, during the period commencing April 1, 1971. The parties now believe that the legal issues so raised are applicable to other products subject to the Wholesome Meat Act. This limitation may be contested by Rath before trial of this action upon a showing of manifest injustice resulting therefrom.

The following issues of fact, and no others, remain to be litigated upon trial.

Rath's Statement of Factual Issues:

1. Was the bacon at issue herein prepared at a Rath establishment under inspection in accordance with the requirements under subchapter I of the Wholesome Meat Act of 1967?

2. How did Christensen and Becker (and/or their subordinates) determine the net content weight of the bacon which they inspected, and how did they determine whether to order it "off sale" (i.e., what standard did they apply to determine whether the contents were "unreasonably less" than the labeled net weight)?

Becker's and Christensen's Statement of Factual Issues:

1. The procedure used by Rath to package its bacon products did not meet USDA standards for net weight control.

2. USDA inspectors do not provide continuous inspection of Rath's in-plant net weight procedures.

3. M. H. Becker recognizes reasonable variations from stated quantity of contents caused by gain or loss of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices in applying California Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5). Each deputy sealer is instructed to and does strictly adhere to the standards of the stated laws.

4. The inspections referred to in section III, paragraph 8 of this order were performed in accordance with the requirements of California Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5). Two hundred and eight lots of Rath bacon were inspected at retail during the period specified. Fifteen of these

lots were short weight but within the variations permitted by Article 5. Eighty four of these lots were unreasonably short weight and were ordered off sale pursuant to section 12211 and Article 5. The eighty four lots ordered off sale represent 40.4% of the lots of Rath bacon inspected. Only packages and lots of Rath bacon which did not meet the standards of Business and Professions Code section 12211 and 4 California Administrative Code sections 2930 *et seq.* (Article 5) were ordered off sale.

5. 4 California Administrative Code sections 2930 *et seq.* (Article 5) (1) is a validly promulgated regulation currently in force (2) contains a statistically valid sampling procedure (3) recognizes and incorporates "reasonable variations" for each lot.

6. Although the United States Department of Agriculture has the authority to inspect meat food products at the retail level to assure accuracy of weight representations, it has not done so and has relied upon the states for such weights and measures enforcement.

7. Rath derives monetary and other benefit from the sale of packages of bacon bearing the information specified in Section III paragraph 6 of this order.

8. Between November 1971 and March 1972, the Los Angeles County Department of Weights and Measures conducted one formal office hearing and had other meetings and informal contacts with Rath officials, including Rath quality control personnel. During these meetings, Rath was informed of the continuing adverse inspection reports and was given opportunities to alter its practices so that Rath bacon would meet the standards enforced by the Los Angeles County Department of Weights and Measures.

9. On February 17, 1972, the Riverside County District Attorney filed a civil action against Rath for injunction and other relief arising from Rath's continued misbranding of packaged bacon.

10. On March 1, 1972, the Los Angeles County District Attorney filed a civil action against Rath for injunctive and other relief arising from Rath's continued misbranding of packaged bacon.

VII

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

Rath's Exhibits:

Number	Description
1	Manual of Meat Inspection Procedures of the United States Department of Agriculture, specifically Sections 317.32, 317.33 and 317.34 on net weight compliance.
2	Rath's "Net Weight Compliance Procedure" —'70 rev.
3	Letter from United States Department of Agriculture dated 4-20-70 by Irwin Fried approving procedure as revised.
4	Control charts from 3-1-71 to latest practical date showing results of hourly weight checks on bacon made at Rath's Vernon plant.
5	Two weight checks made in Vernon plant in 1971 by Los Angeles County Department of Weights and Measures.
6	Mayfair Markets, Inc. check for returned product—(private label sliced meats).

Becker's and Christensen's Objections to Rath's Exhibits:

Exhibits 1, 2 and 3

Becker and Christensen do not dispute that these exhibits are true copies but reserve objections as to the conclusions contained therein.

Exhibit 4

Becker and Christensen reserve objections to introduction of this exhibit (1) for lack of proper foundation, (2) as hearsay, and (3) as to the truth of the contents thereof.

Exhibit 6

Becker and Christensen object to introduction of this exhibit (1) as it is irrelevant to the issues of this action, and (2) for lack of a proper foundation.

Becker's and Christensen's Exhibits:

Number	Description
A	Department of Weights and Measures Certificates of Inspection—Re: Off-Sale Orders of Rath packaged bacon. Certificate numbers: C-22231, 22940, 22981, 22986, 23194, 23753, 24205, 24872, 24880, 25268, 25281, 25546, 26310, 26314, 26320, 26945, 27673, 30170, 30172, 30175, 30272, 30435, 30439, 30462, 30473, 30791, 35723, 35728, 35775, 35777
B	Department of Weights and Measures Certificates—Re: Release of Off-Sale Bacon Products packaged by Rath.

Number	Description
	Certificate numbers: C-10204, 10206, 21744, 22237, 23222, 23243, 23473, 24301, 25110, 25148, 25258, 25282, 25293, 25296, 25938, 26356, 26361, 26375, 26377, 26382, 26399, 26405, 26408, 26429, 27672, 27758, 27766, 28103, 28387, 28388, 29647, 29808, 30048, 30390, 30419, 30444, 30456, 30955, 31759, 31760, 31767, 31780, 31798, 34645, 35171, 35715, 35730, 35739, 35747, 36168, 36178
C	All "Audit Inspection" reports relative to the inspection of Rath packaged bacon between September 1971 through March 1972.
D	All "Article V Package Inspection Reports" relative to Rath packaged bacon between September 1971 through March 1972.
E	Department of Weights and Measures Statistical Summary Sheets of Weight Deviations of Rath packaged bacon for the months of September 1971 through March 1972.
F	Letter from Richard Lyng, Assistant Secretary of the United States Department of Agriculture, to C. B. Christensen, Director of the California Department of Agriculture, dated July 17, 1972.

Rath's Objections to Becker's and Christensen's Exhibits:

As to each exhibit, Rath disputes the truth of relevant matters of fact set forth therein, and reserves objections

as to the admissibility in evidence thereof on grounds of lack of foundation, hearsay, incompetency, irrelevancy and immateriality.

VIII

There is no issue in this action related to Health and Safety Code § 26550, Business and Professions Code § 17500 or Civil Code § 3369.

The following issues of law, and no others, remain to be litigated upon the trial:

Rath's Statement of Legal Issues:

1. Are Becker and/or Christensen imposing marking, labeling and/or packaging requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to bacon prepared at a Rath establishment under inspection in accordance with the requirements under Subchapter I of the Wholesome Meat Act of 1967?

2. Do California Business and Professions Code §§ 12024, 12024.5 and 12211 and/or 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (§ 2930 *et seq.*), as they are being applied by Becker and Christensen, constitute marking, labeling and/or packaging requirements in addition to, or different than, those made under the Wholesome Meat Act of 1967 with respect to bacon prepared at a Rath establishment under inspection in accordance with the requirements under Subchapter I of the Wholesome Meat Act of 1967?

Becker's and Christensen's Statement of Legal Issues:

1. Is a package of a meat food product bearing a statement of quantity in terms of weight which was packed in an establishment subject to federal

inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) "misbranded" as the term is used in said act if it contains an amount of edible meat food product (exclusive of wrappers and packing substances) which is unreasonably less than the amount thereof stated upon the package when such package is outside of such an establishment, (*e.g.*, at point of display and offer for retail sale)?

2. Is a lot of packaged meat food product, comprised of packages bearing the same statement of quantity in terms of weight, which lot was packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*), "misbranded" as that term is used in said act if the average weight of the lot sampled is less than the amount represented upon the packages when displayed and offered for retail sale?

3. May the Secretary of Agriculture detain or order off sale packages or lots of meat food product bearing a statement of quantity in terms of weight which were packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) when such packages are misbranded and are outside of such an establishment (*e.g.*, at point of display and offer for retail sale)?

4. May California Weights and Measures officials detain or order off sale packages or lots of meat food product bearing a statement of quantity in terms of weight which were packed in an establishment subject to federal inspection pursuant to the federal Wholesome Meat Act (21 U.S.C. §§ 601 *et seq.*) when such packages are misbranded and are outside of such an establishment (*e.g.*, at point of display and offer for retail sale)?

5. Are California Business and Professions Code §§ 12024, 12024.5, 12211 and 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (§§ 2930 *et seq.*) valid means of enforcing the misbranding standards of the federal Wholesome Meat Act which relate to weight?

In the alternative, does the reserved Police Power of the States or the federal Wholesome Meat Act's grant of concurrent jurisdiction to the states permit the promulgation and enforcement by the State of California of misbranding regulations more stringent than those made by the federal government pursuant to the Wholesome Meat Act?

6. Did M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures act in accordance with state and federal laws when he ordered off sale lots of bacon packaged by Rath which were misbranded (*i.e.*, were unreasonably short weight as determined by 4 California Administrative Code §§ 2930 *et seq.*) when displayed and offered for retail sale?

7. May Rath be enjoined from selling, offering for sale, permitting to be offered for sale or permitting to be sold for human food purposes at the retail level meat food products packaged in establishments subject to the Wholesome Meat Act, which packages contain a statement of quantity in terms of weight and which are misbranded at time of display and offer for retail sale?

IX

The foregoing admissions having been made by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this

order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: September 25, 1972.

/s/ Manuel L. Real
United States District Judge

Approved as to form and content:

/s/ Dean C. Dunlavey
Attorney for Plaintiff Rath

/s/ Arnold K. Graham 9/20/72
Attorney for Defendant Becker

/s/ Allan J. Goodman
Attorney for Intervenor Christensen

Civil Minutes—General.

United States District Court, Central District of California.

Case No. 72-607-R.

Date 3-5-73.

Title: Rath Packing v. M. H. Becker, et al.

DOCKET ENTRY:

Court orders submission of case vacated and case set for further trial 3-27-73 at 9:30 a.m. and consolidated with 72-608-R for trial.

Present: Hon. /s/ M. L. Real, Judge; /s/ Tamara Saunders, Deputy Clerk; /s/ Florence Carcia, Court Reporter.

Attorneys Present for Plaintiffs: /s/ Dean C. Dunlavey; Attorneys Present for Defendants: none present.

Proceedings: Court orders the submission of this case is vacated and the case is set for further trial on Mar. 27, 1973 at 9:30 a.m. and consolidated with No. 72-608-R.

[RT 27-28]

HUNTER COHEN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Will you state your true and correct name.

THE WITNESS: Hunter Cohen.

[RT 30]

Q Would you tell the court your present capacity within the United States Department of Agriculture?

A Sub-area supervisor for Southern California.

[RT 32]

Q Would you tell the court what laws are enforced by the United States Department of Agriculture in the inspection of meat in general but in bacon in particular?

A The law commonly referred to as the Wholesome Meat Act.

[RT 34-35]

Q Has the Rath establishment at Vernon, California been granted inspection by the Department of Agriculture?

A It has.

Q What official number has it been assigned?

A 186L.

Q And can you tell the court the effective date of that granting of inspection?

A Effective June 7, 1965.

Q Has that inspection been continuous in effect from that date to the present?

A It has.

Q From at least April 1971 until the present has there been one or more inspectors of the United States Department of Agriculture assigned to the Rath Vernon plant?

A Yes, there have.

Q Has the purpose of the assignment of those inspectors been to enforce the federal laws and regulations that you have already described?

A It has.

[RT 67]

Q In any of the records of the USDA, Dr. Cohen, is there any record that any bacon ever left the Rath establishment from April '71 to the present time that was not correctly labeled as to net weight?

A There is no such record.

Q Do you have any knowledge or information that any bacon ever left the Rath establishment from April '71 to the present that did not meet the net weight requirements imposed by the United States Department of Agriculture?

A No, I do not.

[RT 68-69]

Q Do you have any personal knowledge or do you have any information ascertained from the United States Department of Agriculture records that any bacon left the Rath Vernon establishment from April 1971 to the present that was not in compliance with the labeling and weight requirements of the federal laws and regulations?

THE WITNESS: No.

* * *

[RT 82]

Q To your knowledge are inspectors assigned to the Rath plant continuously?

A As continuously as any other establishment, yes.

Q I don't know that that is responsive.

Are they assigned to the Rath plant continuously during the entire production period of the Rath plant?

A The answer is no.

Q Why not?

A Because the service of a full time inspector at the Rath plant is not always required. There are times when the services of an inspector can be used in more than one establishment.

Q Are you saying then, Dr. Cohen, that is not continuous inspection of the Rath plant?

A No, I am not. There is continuous inspection at the Rath plant.

[RT 83]

Q Are you saying that your inspectors continuously inspect the Rath plant all the time the plant is in production of bacon?

A Or any other meat food product, yes.

[RT 86-87]

Q Dr. Cohen, in such inspection as it makes of bacon weight at the Rath Vernon establishment does the United States Department of Agriculture use a dry tare or a wet tare?

A Dry tare within the definition that I heard you make.

Q In my opening argument?

A In your opening statement.

Q My argument was not evidence so would you tell the court what the tare means?

A The tare is the packaging materials for the unit being weighed for determination of net weight stabilized so it is maintained under the same conditions of humidity and temperature as the packaging material being used in the line.

Q Would you tell the court what the word dry means as opposed to a description of tare?

A Within the definition again which you proposed and which is not used to my knowledge by the department, it refers to the packaging material, the weight of the packaging material before it is filled with the product.

Q Does that imply that the tare weight does not include anything that has been absorbed from the product itself?

A It does.

[RT 87-88]

Q Does the United States Department of Agriculture in its inspection as to net weight conduct its inspection before the product leaves the plant or after the product leaves the plant?

A Before it leaves the plant.

[RT 88-89]

Q Dr. Cohen, you have testified that in the plant inspections a dry tare is used. Does your department to your knowledge make inspection outside the plant after the product has left the establishment?

A It becomes a matter of the definition of inspections. To my knowledge there are reviews of product at retail to assure that they have not become adulterated or mishandled. But this is done by a separate authority. Our compliance and review staff.

Q Is that under Mr. Hutchings?

A That is correct.

Q To your knowledge does the department check for misbranding of packages outside the plant?

A Yes, it does.

[RT 90]

CHESTER ARTHUR JAENSEN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Would you state your true and correct name.

THE WITNESS: Chester Jaensen, J-a-e-n-s-e-n.

[RT 90-91]

Q Would you tell the court your present employment?

A Rath Packing Company.

Q At what location?

A At the Vernon plant, Los Angeles branch.

Q And what is your position there at the present time?

A Plant manager.

Q Has that been your position continuously since at least April 1971?

A Yes.

[RT 91]

Q Have you observed the Department of Agriculture inspectors in your plant?

A I have.

Q Have they been there daily since at least April '71 to the present time?

A They have.

Q Do these inspectors have access to all parts of the plant at all times, day or night?

A They do.

[RT 96-97]

Q Would you tell the court in a little more detail the nature of the makeup of this board upon which the approximately one pound draft is put?

A Well, we currently are using two boards. They are hardboard construction. One is wax coated and the other is polyethylene coated.

Q What kind was used predominantly in the year 1971?

A The wax coated board.

Q And how long into 1972 did it continue to be used?

A Until March of '72.

Q Is it still being used for certain qualities of bacon?

A Yes, it is.

[RT 97-100]

Q Would you tell the court a little more thoroughly what happens to the bacon after these approximately one pound increments on there, drafts on the board, are conveyed down the line?

A They are conveyed to a scale station where an operator either adds or subtracts bacon to bring them into a predetermined target area that is clearly marked on the face of her scale.

After scaling she then places the draft of bacon back on a line that conveys it to an overwrap carton machine called a tux wrap machine. There is a tux operator who then inserts the wrapped bacon into the overwrap carton. It has a pre-applied adhesive on the end that is heat activated and sealed.

Q Is this entire process from slicing machine to sealing of the carton accessible for inspection by the United States Department of Agriculture inspector?

A Yes, it is.

Q Does the scaler, this person who weighs the bacon, bring the bacon to exactly one pound?

A No, she does not.

Q Would you tell the court exactly what kind of weight limits the scaler does achieve at the processing line?

A We have established a pass zone of 10/16ths of an ounce wide that is centered on the target weight.

Q What is the target weight with respect to the pass zone?

A Their current target weight?

Q No, just in general what is the relationship between the target weight and the pass zone?

A The pass zone is centered on the target weight.

Q You are saying the target weight is the midpoint of the pass zone?

A Yes.

Q Do I understand you correctly that this person either adds or subtracts bacon until the weight of the bacon falls somewhere within the pass zone?

A That is correct.

Q What was the pass zone with respect to an even pound that was being used by the Rath Company as of April 1, 1971?

A At that time our pass zone was minus 2-plus 8.

Q Would you tell—

A This would be 2/16ths understated net weight through 8/16ths overstated net weight.

Q Sixteenths of what?

A Of an ounce. This would give us a target weight of 3/16ths of an ounce overstated net weight.

Q Was that pass zone subsequently changed?

A Yes, it was.

Q Can you tell the court approximately when and the nature of the change.

A On October 27, 1971 it was changed to a zero plus 10 which gives us a 5/16ths of an ounce overstated net weight.

Q Was it thereafter changed?

A Yes.

Q Excuse me, let me back up.

What was the reason for the change in October of '71?

A It was changed because of pressures being applied at that time by the L.A. Department of Weights and Measures.

Q By pressures, you refer specifically to what?

A Off sale orders.

Q Was the pass zone changed after October '71?

A Yes.

Q Can you tell the court approximately when and how?

A On January 12, 1972. It was changed to a plus 2-plus 12.

Q And the reason?

A Again due to off sale orders.

Q By—

A The L.A. County Weights and Measures.

Q Was the pass zone subsequently changed?

A Yes, it was.

Q Tell the court when and how.

A On March 2, 1972 it was changed to plus 7-plus 17.

[RT 100-102]

Q Was it thereafter changed?

A Yes, it was.

Q Tell the court how and when.

A On April 29. We had—when we started using the poly inserts. On some of the bacon it was reduced to plus 3-plus 13.

Q And with respect to what kind of product and what kind of package?

A All product that was packed on the polyethylene insert which at that time included one pound product. The balance of the product that was packed at that time was left at the plus 7-plus 17 because it was still being packed on a wax insert.

Q Would you tell the court what the relationship is between the kind of board and the amount of pass zone for overpack?

A Well, the plus 7-plus 17 gives us 12/16ths of an ounce overpack. And the plus 3-plus 13 gives us 8/16ths of an ounce overpack from stated net weight.

Q Why do you have a lesser overpack on a polyethylene board than as on a wax board?

A The polyethylene board does not absorb moisture or wick, like a wax board will.

Q During the period April, 1971 to the present time what has been the lowest target overpack that has been used at the Rath Vernon plant?

A Three-sixteenths of an ounce overstated net weight.

Q Does that mean that the net content of bacon is 3/16ths over an even pound if it happens to be the pound package?

A On the average, yes.

Q Can you tell the court the cost to Rath of the overpackage which has exceeded 3/16ths of an ounce from October '71 to the present time.

* * *

THE COURT: Has it been more than \$10,000?

THE WITNESS: Yes.

[RT 107]

Q Is the average weight of the bacon essentially the target weight for that particular range run?

A Yes, it is.

[RT 108-109]

Q What is the average time that the bacon will remain inside the Rath plant in that cooler before it is shipped?

A Approximately four days.

Q And approximately the maximum time that bacon would ever stay in the cooler before shipment?

A No more than eight or nine.

[RT 110]

Q Has Rath paid to customers in excess of \$10,000 since April 1971 as compensation for products that have been returned by those customers to Rath because of the off sale activities of the Department of Weights and Measures of Los Angeles County?

THE WITNESS: Yes, they have.

[RT 118]

Q So it would be a correct statement that if the product passes at the point immediately after slice that it would not be inspected by the Rath personnel prior to shipment?

A No, no, it would not be inspected again.

Q So the answer to my question is yes, it would not be inspected at another later point prior to shipment?

A That is correct.

[RT 131-132]

Q Can you tell us how much moisture is absorbed by a polyethylene board, if any?

A I can say approximately 4/16ths ounce is absorbed less in the polyethylene than in the wax.

Q So then does the polyethylene absorb any moisture at all?

A I don't know.

Q But it does absorb 4/16ths of an ounce less than a wax board?

A Yes.

[RT 133]

Q Do you know how much moisture would be lost during in-plant storage?

A Approximately.

Q What is that approximation?

A One-sixteenth of an ounce.

[RT 135]

Q Mr. Jaensen, do you know whether a federal inspector is always on the premises of the Rath Vernon plant during the night shifts?

A Yes, I do.

Q Is a federal inspector continuously on the premises of the Rath Vernon plant during the night shifts?

A No.

Q And this has been the case since April 1971 through this date?

A That is correct.

[RT 139]

Q Does your company have a control date on the packages when they are placed in shipping?

A Yes.

Q What is the length of that control date?

A I don't know whether you would call it control date or not. We date 21 days out on the package from the time it is packed.

[RT 140]

Q Mr. Jaensen, is there a point of time after you market a package to your customers beyond which you will not allow it to be returned to your plant for any reason?

A That is correct.

Q What is that period of time?

A 21 days from the date of pack.

[RT 141]

Q Mr. Jaensen, do you have any control over the packages which leave your plant after they leave the plant?

A No.

Q You do not ever assume any control over the packages?

A Do we have control of them?

Q Do you have control or do you ever assume control of the packages?

A No.

[RT 142]

THE COURT: * * * Do you pick up from a retailer who has been given an off sale notice?

THE WITNESS: Yes, we do, your Honor.

* * *

Q On all your bacon which has been ordered off sale?

A That we are notified of.

Q Even if it is beyond the 21 day period?

A Yes.

Q You pick it up?

A Yes.

Q Do you credit them? Do you give them a monetary credit?

A Yes.

Q Even beyond the 21 day period?

A Yes.

Q You are certain of that?

A Yes.

[RT 143]

Q And that you have packaged with polyethylene coated inserts and boards to eliminate the loss of some of the moisture from the product, you have done this?

A Yes, sir.

[RT 147]

Q To your knowledge is there anything that will cause the package of bacon to lose weight from the time it is packaged until the time it leaves the Rath shipping cooler except for this 1/16th ounce loss of moisture that you have already testified to?

A I would assume that there would be some absorption if we were looking at the wax board. But I wouldn't—

Q But as far as weight getting out of the package entirely is there anything other than the 1/16th?

A No, sir, not that I know of.

Q Is it a correct inference then that the weight of the bacon when it leaves the plant is the overpack less its moisture loss in the cooler?

A That is correct.

[RT 159]

HAROLD BAKER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Would you state your true name.

THE WITNESS: Harold Baker.

[RT 160]

Q Will you tell the court when you joined Rath.

A 1965.

Q And would you tell the court the duties and functions you have performed at Rath since that time.

A The duties at Rath involve quality procedures in all the various Rath plants for assuring conformance to our own specifications as well as the requirements of the United States Department of Agriculture.

[RT 166]

THE WITNESS: Yes. The amount of moisture lost while the product is still retained in our plant in the shipping cooler and for the periods of time less than nine days, which is what we are talking about for nearly a hundred percent of our bacon, the amount of loss due to moisture evaporation will be approximately a sixteenth of an ounce.

[RT 171-172]

Q Would you tell the court what observation you have made as to the quantitative amount of absorption which goes on and the time during which it takes place?

A The insert board itself will absorb approximately 5/16ths of an ounce in six to nine days after pack. I say absorbed. I might clarify that in that most of it is absorption in to the board. There is, however, some clingage to the board itself of grease and moisture.

Q Something that would be—

A On the surface which could be scraped off. Right.

Q If that is the amount that takes place in six to nine days what takes place after that, if any?

A The test that indicates that the board does, for lack of a better term, reach a saturation point beyond which there is no further absorption. That saturation point comes at approximately 5/16ths of an ounce.

[RT 172]

Q Do you have information also as to the rate of moisture loss under simulated retail conditions?

A Yes, I do have. The tux package bacon when exposed to the conditions typical of a retail type showcase will show a loss of moisture to the atmosphere of .3 to .4/16ths of an ounce per day during the time that it is in that case.

[RT 173-174]

Q Are you familiar with the weight sampling procedures as they are employed by the Los Angeles Bureau of Weights and Measures?

A Yes, I am.

Q Would you tell the court the kind of tare that is used in the weight at the plant as compared with the kind of tare that is used by the Los Angeles Department of Weights and Measures?

* * *

THE WITNESS: Under the federal procedures and under the Rath net weight compliance program we use a dry tare. By definition a dry tare is a packaging material which has nothing on it foreign to the packaging material itself.

* * *

THE WITNESS: The California procedures require the use of a wet tare which means that anything foreign to the packaging material itself is included as a part of the weight of that tare.

[RT 176]

Q Is it or is it not a correct inference that subtraction of the heavier weight of the wet tare yields a net weight determination which is less than the arithmetical deduction of the dry tare weight?

* * *

THE WITNESS: Yes, it is obviously true that if the tare material or packaging material absorbs some part of the product that is put into that package that the difference will be reflected—will reflect itself as a lesser weight using a dry tare than it will as a wet tare. In the case of bacon that would be approximately 5/16ths of an ounce.

BY MR. DUNLAVEY:

Q You said a lesser weight using a dry tare. Did you mean a lesser weight subtracting the wet tare—a lesser net weight when you subtract the wet tare?

A The net weight using the wet tare will be lower than the net weight using the dry tare.

[RT 180]

Q If the California test were applied at the Rath establishment simultaneously with the application of the Rath test is it statistically possible that simultaneously applied the two tests would come to different results in the sense that one would accept the lot and one would reject it?

A Yes, it is very possible.

Q Included in that possibility is there the possibility that the Rath procedure of weighing would accept a lot whereas the California system would reject it?

A Yes.

[RT 181]

Q Have you reviewed the product inspection reports which have been submitted to Rath by the Department of Weights and Measures as part of the pretrial procedures in this case?

A Yes, I have.

Q How many lots of bacon were inspected by the department according to those reports?

A 101.

Q How many of those were passed, if any?

A There were 30 lots that were passed, 71 were rejected.

Q Did any of the lots which were rejected contain bacon weighed at a date after the retail control date stamped on the bacon package?

A Of the 71 rejected lots 21 of those lots were beyond the retail control date, that is over the 21 day retail date stamped on the package.

Q Did you make a calculation as to the average shortage in the samples contained within those 71 rejected lots, that is differences between net weight and stated net weight?

[RT 182]

A Yes, I did.

The average underweight for the 71 rejected lots was less than 4/16ths of an ounce.

Q In terms of percentage of a pound what percentage is that?

A It would be under 2 percent, under 2 percent.

Q What was the minimum sample shortage—average sample shortage of those various rejected lots—what was the sample shortage in the lot which had the least of the shortages?

A You mean which was closest to the stated net weight?

Q Correct.

A Minus .2 3/16ths of an ounce.

Q Is it your testimony that the bacon in that particular lot was ordered off sale because it was 2/10ths of 1/16th of an ounce below stated net weight?

A That is correct.

[RT 184-185]

Q You have explained to the court the differences in time when these federal and Rath weight tests are made as distinguished when the California tests are made. Although it may be self-evident, just for the record would you tell the court what consequences follow from the fact that these two tests take place at different times?

A As I recall, the PIR's, the California weight checks are performed anywhere from the day following slice to 59 days later.

Q And—excuse me.

A The weight loss due to evaporation is linear and it continues from the time that bacon is put into the retail case until the consumer actually fries it. Therefore since we are checking, again using a dry tare, in plant and assuring that the product meets the requirement of federal regulation, the weight loss due to board absorption, clingage and evaporative loss during time cannot help but make the California weights read lower than those weights determined at plant level.

Q You say weight. Do you mean net weight of contents?

A Net weight of contents.

Q Do you have an opinion as to whether those differences account at least in part for bacon being ordered—strike—for bacon failing to meet the California test although it has met the test in the plant?

A In great part, yes.

Q And your opinion is that it does or does not contribute to the difference between those two tests—let me straighten that out.

Do you have an opinion as to whether this loss of moisture during the course of distribution is a contributing factor to the fact that California can find short weight under its test as to the same produce that previously passed the federal or Rath test?

A The answer is yes, it does.

[RT 192-193]

Q Does your company utilize any particular methods, merchandising or packaging, which controls shrink after the product has been packaged?

A Product shrinks less in—in fact, product does not shrink in a vacuum package, if that is what you are asking, as opposed to the shrinkage loss that we get in the tux pack.

Q Does a different kind of insert board affect the loss of moisture from a product?

A It affects the amount of—a polyethylene-coated insert as opposed to a wax-coated insert affects the amount of absorption by the insert board, yes.

[RT 203]

Q Mr. Baker, if you removed a package of bacon from a retail display case and subtract the weight of the tare as found in the retail market from the weight of the package would the arithmetical difference be the amount of bacon meat available to the consumer?

A Yes.

[RT 204]

MAYNARD HAROLD BECKER,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUNLAVEY:

Q Mr. Becker, would you tell the court your occupation.

A Director of the Los Angeles County Department of Weights and Measures.

[RT 212]

Q Am I correct that the way in which your department measures the weight of anything that it is investigating is through use of a test procedure that is set out in the Department of Agriculture regulations?

A That is correct.

Q Specifically, is that test found in 4 California Administrative Code, Chapter 18, Subchapter 2, Article 5?

A Yes.

[RT 215-216]

Q Am I correct that in your department application of the Article 5 test procedure to bacon that your inspectors are undertaking to measure the net content weight of bacon at the point of inspection?

A Yes.

Q So if the inspector is weighing bacon in the retail store he is undertaking to measure net weight right at that point in time?

A Yes.

[RT 216-217]

Q If your inspector ascertained under the application of Article 5 that they regard a package or packages of bacon to weigh less than stated net weight are they given any instructions to investigate why

that short weight may have occurred in deciding whether to order the commodity off sale?

A No.

Q Am I correct then that as to the bacon which has been ordered off sale and which is at issue in this lawsuit your inspectors have received no instruction to investigate the kind of distribution that that product was subjected to before they weighed it?

A They are not.

[RT 218]

Q Am I correct that your inspectors make no allowance for whether a bacon package labeled one pound had net contents weighing a pound when it left the plant if they find that according to the Article 5 test the package does not have net contents of a pound at the store level?

* * *

THE WITNESS: You are correct.

[RT 219]

Q Am I correct, Mr. Becker, that your department gives no recognition to loss of moisture during good distribution practice in deciding whether to order bacon off sale under the Article 5 test?

* * *

THE WITNESS: The department doesn't. Article 5 gives whatever consideration is in the application of that to the packages.

BY MR. DUNLAVEY:

Q So your department—let's take it one step at a time.

Your department gives no recognition to that fact?

A No, it does not.

Q And unless Article 5 is found to do so then no recognition is given, is that correct?

A That is correct.

[RT 225]

WESLEY ROBERT MOSSBERG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Thank you. Please take the stand. State your true and correct name, please.

THE WITNESS: Wesley Robert Mossberg.

* * *

Q Mr. Mossberg, by whom are you currently employed?

A I am employed by the County of Los Angeles, Department of Weights and Measures.

Q What is your title and your job function?

A My title is Chief Weights and Measures Inspector. I head the Compliance and Investigation Division of the department.

[RT 227a]

Q Am I correct that your department began concentrated inspection on weights of bacon in Los Angeles County in the latter part of 1971?

A Yes.

Q And this was triggered by more than the usual number of off sale orders of bacon of various brands coming from different counties, is that true?

A Yes.

[RT 234]

Q That is exactly the point that I wanted to make.

When the inspector is weighing bacon following the Article 5 procedure he weighs the bacon and the

packaging material together and does not weigh the net contents of bacon separately from the packaging material, is that true?

A True.

Q And the way he ascertains what he believes to be the net weight of the bacon is by subtracting a certain weight attributable to the packaging materials from the overall weight which he observes?

A In the case of the tare sample size he would subtract this value from the gross weight. In the remainder of the weighings this average weight would be counterbalanced on the scale.

[RT 240]

Q The question was whether your department recognizes variations from stated net weight which has been caused by distribution practices.

A I am sorry, I can't answer that question.

Q You know of no such variation that your department recognizes, is that true?

A I know of no variation that the department has recognized.

[RT 242]

I would also like to read from the witness's deposition, page 92, lines 20 to 26:

"According to the procedures used by your inspectors if a package of bacon left Rath's plant weighing at least a pound but lost moisture during the course of distribution so that when an inspector found it it weighs somewhat less than a pound, would that be taken into consideration by the inspector when deciding whether to order it off sale?

"A Not for that purpose, no."

[RT 246]

NORMAN L. METTERT,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:

THE CLERK: Please take the stand and state your true and correct name.

THE WITNESS: Norman L. Mettert, M-e-t-t-e-r-t.

* * *

Q By whom are you now employed?

A Department of Weights and Measures, Los Angeles County.

* * *

Q What is your present capacity?

A I am supervisor for the Compliance and Investigation Division.

[RT 268]

Q So when Inspector Livasy who wrote this report came to that point, that is Step 12, he had gone far enough to find that a shortage in that particular lot might or might not exist, are we properly following him?

A I would say probably not. That a determination should have been that there was no shortages existing.

Q Sir?

A I would say that the determination should have been that there was no shortage existing.

Q You are anticipating me. You are saying that this man ordered the material off sale erroneously?

A Yes, sir.

[RT 273]

MR. DUNLAVEY: I will offer to read from the witness's deposition, page 38, line 29 to page 39, line 1.

“Q Can you tell me specifically what changes occur in bacon between the time of packaging and the time of selling to the consumer?”

“A Well, it will continue to lose a certain amount of weight.”

[RT 274]

“Q Am I correct then that if bacon were to leave a packing plant with an average content weight of a pound a package and were to lose moisture in the course of what we will assume to be good distribution practice so that when your man gets to the counter he finds that it weighs less than a pound and should be ordered off sale in accordance with the state standards he will in fact order it off sale irrespective of the treatment it has received up to that point?”

“A That's right, sir.”

[RT 277]

“Does your department in its inspection of bacon tell the inspectors that any specific shortage below a pound will be permitted in order to compensate or allow for loss of moisture as distinguished from anything else?”

“A No, sir.”

[RT 282]

ALBERT J. PFEIFER,

called as a witness on behalf of the plaintiff, under Rule 43(b), being first duly sworn, testified as follows:

THE CLERK: Please be seated. State your true and correct name.

THE WITNESS: Albert J. Pfeifer, P-f-e-i-f-e-r.

[RT 283]

Q What is your employment at present?

A Inspector for the Department of Weights and Measures, Los Angeles County.

[RT 293-294]

MR. DUNLAVEY: I would read from page 36, lines 6 to 18:

"Q If a package of bacon labeled one pound net weight were to leave the Rath plant with an actual content weight in excess of that one pound but during the course of good distribution practice were to lose moisture so that it fell below the one pound weight it would be ordered off sale pursuant to California requirements irrespective of the fact that it had left the Rath plant in compliance with federal requirements; is that true?

"A If we found it short weight that would be correct, yes.

"Q Then when your department finds bacon short weight pursuant to California tests at the retail level your department makes no inquiry as to whether the cause of that short weight has been loss of moisture during good distribution practices?

"A No, we do not."

[RT 295]

Q When you are testing bacon for weight in the retail market the time when you require the statement on the label as to net weight to be accurate is right at the moment you are making the inspection, is that not true?

A Yes, that is true.

[RT 296]

MR. DUNLAVEY: The deposition is Rex R. Magee. The deposition is being offered as though the examination were taking place under Rule 43(b), page 3, lines 6 and 7:

"Q Would you state your full name, please.

"A Rex R. Magee."

[RT 297]

"Q By whom are you now employed?

"A The Department of Agriculture.

"Q State of California.

"A State of California."

[RT 303-304]

"Q Since we don't have the document here this morning can you tell me generally the conclusions you reached and stated in there?

"A Yes. Any lot inspected by—inspected and passed by Article 5 and then immediately inspected and passed—inspected by the federal procedures on the lot inspection basis would—there is a possibility that the federal procedure could reject a lot passed by the Article 5.

"Q Did you find any possibility that the federal could pass a lot that would be rejected by Article 5?

"A Yes. This is in the procedure where the feds have established maximum range values and thus individual errors or minus packages having established on the basis of a maximum, then Article 5 which inspects the lots and establishes the range values that are within the lot, it could be that a lot would be rejected for unreasonable errors in Article 5 and—

“Q Whereas it would have been passed by federal?

“A And passed by federal.”

Page 30, lines 11 to 18:

“Q Do I understand you correctly that if the federal inspection procedures as set forth in the manual and the California inspection procedure as set forth in Article 5 were being applied simultaneously to the same lot that in some cases they would both accept or reject, that in some other cases the federal might pass and the California would reject and in still other cases the federal might reject and the state might pass?

“A Yes.”

[RT 310]

“Am I correct that Article 5 does not contain any specific provisions as to shrinkage of bacon or any other product?

“A To the best of my knowledge it does not.”

[RT 439]

Q Am I correct that whatever deviation below stated net weight which may be permitted by California testing procedure in no way is that deviation allowed specifically for loss of moisture from the product?

A It allowed for sampling error.

Q And not for loss of moisture?

A Not to my knowledge.